



Kazakhstan v. Aigul Utepova

April 2022

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHOR:

TrialWatch is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change. The TrialWatch initiative drafted this report.

ABOUT THE EXPERT:

Éva Szeli is a Hungarian-American psychologist and lawyer, specializing in the human rights of persons with mental disabilities. Dr. Szeli's work has included human rights investigations and advocacy training in Bulgaria, Estonia, Hungary, Kosovo, Latvia, Russia, Serbia, and Ukraine, as well as presentations on mental disability rights for United Nations (UN) and European Union (EU) bodies. She taught distance-learning courses in mental disability law at New York Law School and co-authored the first casebook in international human rights and mental disability law. She is currently on the Psychology faculty of Arizona State University.

The views expressed in this report are not necessarily those of the Clooney Foundation for Justice.



TrialWatch Expert Éva Szeli assigned this trial a grade of D:

The criminal proceedings instituted against Aigul Utepova failed to meet international standards and Kazakhstan's obligations under international human rights law. In direct contravention of the rights guaranteed by the International Covenant on Civil and Political Rights, the prosecuting and judicial authorities arbitrarily detained Utepova and failed to provide her with a fair trial, with the explicit intent to deny her freedom of expression, assembly, and association. Her pre-trial detention, trial, conviction, and sentencing were politically motivated and unlawful.

It has been almost one year since the conviction of journalist Aigul Utepova in Kazakhstan. From March to April 2021, the Clooney Foundation for Justice monitored her trial. Utepova is a freelance journalist who was prosecuted and convicted on the basis of social media posts perceived to be in support of the Kazakh opposition parties DCK and Koshe, which are considered peaceful by international bodies and governments but have been banned as 'extremist organizations' in secret decisions by Kazakh courts. From the outset of the criminal proceedings against Utepova, which included her forced committal to a psychiatric clinic despite no evidence of mental illness and seven months of unjustified house arrest, it was clear that the case was but a means to punish her for independent commentary and that the outcome was predetermined. In particular, the trial was marred by the judge's biased conduct.

The court consistently and unreasonably ruled to the detriment of the defense and its convicting verdict relied almost entirely on the flawed findings of prosecution experts. As a result of her conviction, Utepova has lost her livelihood and freedom: she was banned from leaving her house except for work, has been denied access to her bank accounts, and is prohibited from publishing anything relating to political or social issues. More broadly, Utepova's case is one of many examples of the Kazakh authorities' misuse of vague and overbroad anti-extremism legislation to target dissenting voices.

Utepova's case predates the recent protests and violence in Kazakhstan. The authorities' harsh response to demonstrations, however, is a through-line, with economic discontent both a central platform of DCK and Koshe, and the impetus behind the January protests.

The case against Ms. Utepova offers a grim picture of what may happen to the hundreds of individuals facing criminal charges in connection with the unrest.

Case History

In 2018, the Yesil District Court in Nur-Sultan banned the DCK, labeling it an extremist organization. On May 19, 2020, the Yesil District Court banned the newly formed Koshe Party as extremist, finding it to be a successor organization of the DCK. Neither decision has been made public. The European Parliament and U.S. State Department have, however, characterized the parties as peaceful. Under Article 405(2) of the Kazakh Criminal Code, participation in the activities of banned organizations is subject to criminal prosecution, carrying a potential sentence of up to two years in prison.

In September 2020, Utepova was arrested and detained for various social media posts and other public activities – stretching back into 2019 – that the authorities perceived as supporting the DCK and Koshe parties: for example, Facebook posts stating “Therefore, my choice is the party ‘KOSHE’” and “What if I say that I support DCK, would anyone be surprised?” After Utepova was held in custody for 72 hours, a court approved an investigator’s request that she be placed under house arrest (courts subsequently extended Utepova’s house arrest through the end of her trial, lasting approximately 7 months).

Soon after Utepova’s arrest, an investigator requested that she undergo an outpatient psychiatric examination. In November 2020, based on the inconclusive results of the examination, a court ordered that Utepova be forcibly committed to a psychiatric clinic for further observation. In December 2020, Utepova was declared mentally healthy and released. In February 2021, the prosecutor issued an indictment formally charging her under Article 405(2). Notably, the prosecution did not allege that any of Utepova’s posts or other acts entailed a call to violence.

Utepova’s trial started on March 15, 2021. The prosecution’s presentation almost exclusively centered on a written opinion produced by a political science expert, a philological expert, and a psychological expert, which found that the charged acts could create a negative attitude towards the authorities, could lead to “anti-social” activities, and constituted systematic distribution of “agitation and propaganda materials.” The prosecution called two witnesses in support of its case: the political science expert who contributed to the written opinion and a separate political science expert who gave an opinion during the first days of the investigation.

At trial, it emerged that the former was still a doctoral student and that the latter had her degree in history – not political science. Further, the second political science expert refused to answer the vast majority of questions from the defense about her methodology, stating that she had returned all materials to the police and could not recall specifics. On

April 29, 2021, after nine hearings, the court convicted Utepova. She was sentenced to one year of restricted movement (including confinement to her residence in her “free time”) and was banned from social media use and public activism for two years.

Pretrial and Trial Violations

The pretrial stage of the proceedings was riddled with rights abuses. Most importantly, Utepova’s commitment to a psychiatric clinic and prolonged house arrest violated the International Covenant on Civil and Political Rights (ICCPR), to which Kazakhstan is party. Both forced committal and house arrest qualify as a deprivation of liberty. Under the ICCPR, a deprivation of liberty must be the last resort and only imposed when absolutely necessary.

The Human Rights Committee, which monitors implementation of the ICCPR, has held that individuals may not be forcibly committed unless they pose a danger to themselves or others. With respect to Utepova, however, the court authorized a month-long committal purely for the purposes of observation and without any indication that she even had a mental disability, let alone was a security risk. Neither Utepova’s initial examination nor the examination conducted at the psychiatric clinic found evidence of a mental disability, reflecting the needlessness of her committal and falling in line with broader patterns of forced committal of political activists.

Likewise, the orders authorizing and extending house arrest contained no concrete justification for why it was necessary: there was no indication, for example, that Utepova might flee the country or interfere with evidence. Instead, the court inverted the necessity requirement, stating that there was no special reason for Utepova *not* to be under house arrest. The lack of grounds for either Utepova’s 18 days at the psychiatric clinic or 7 months of house arrest suggests that she was being punished for her independent commentary, rendering both measures arbitrary.

The trial itself was marred by the presiding judge’s bias. First, the judge refused defense requests to summon key witnesses, such as the experts who contributed to the aforementioned written opinion, the linchpin of the prosecution’s case, as well as investigators who helped prepare case materials. Despite the importance of such witnesses to the defense argument that Utepova’s social media posts could not qualify as “participation” in the “activities” of DCK and Koshe under Article 405(2) (more on this below), the judge either failed to provide any explanation for denying the witness requests or claimed that the examination of witnesses was unnecessary and would cause delays.

Second, when the few witnesses who did appear either refused to testify or to answer defense inquiries, the court did not intervene. In a particularly absurd exchange, the political science expert who provided an initial opinion in the case stated that she could

not explain her methodology because she had “g[iven] back to the investigation the materials, which were in hard copy, so [she] [could] not say anything.” When asked further about the methodology, the expert stated: “I will not tell you anything, since I have no materials on hand which I returned to the police.” Defense counsel requested re-examination of the witness at a later time so that she could prepare. The court not only denied this request, depriving the defense of the ability to conduct an effective cross-examination, but neither reminded the expert of her obligation to testify nor explained why she was entitled not to do so.

Third, the court unequivocally accepted the findings of the state experts, quoting the conclusions of the written expert opinion in full in its verdict without further analysis of the substance or assessment of the experts’ qualifications. Indeed, the court even cites the testimony of the aforementioned expert who refused to answer defense questions in support of the verdict, indicating that the outcome was not driven by evidence but predetermined.

Fourth, the court’s reliance on the expert opinion was all the more unjustified given that it was based on acts outside the scope of the criminal case: although the court had ruled that only acts after June 2020 were relevant because of the date that the decision banning Koshe came into force, the expert opinion on which the court’s verdict turned was based on acts stretching back into 2019. The verdict makes no mention, however, of how – if at all – it addressed this issue.

The above violated the ICCPR’s guarantee of judicial impartiality.

Freedom of Expression and Anti-Extremism Legislation

Beyond violating Utepova’s fair trial rights, the proceedings violated her right to freedom of expression. Under the ICCPR, any restrictions on speech must be necessary and proportional. This means that criminal proceedings and potential imprisonment should be reserved for exceptionally grave acts, such as incitement to genocide and terrorism. None of the posts or other acts with which Utepova was charged contain a reference to or invocation of violence. Indeed, the indictment and verdict explicitly state that the materials examined did not evince a call to violent overthrow of the government and that the case instead was based on Utepova’s peaceful expression of support for the DCK and Koshe. Her criminal prosecution thus violated her right to freedom of expression.

The vagueness of Kazakhstan’s anti-extremism legislation facilitated the rights abuses in Utepova’s case. Under Article 405(2), “participation’ in the “activities” of a banned organization is criminalized. It is unclear, however, what would constitute “participation” and what would qualify as “activities” of a banned organization. It is also unclear why the DCK and Koshe were deemed extremist in the first place. These ambiguities were

demonstrated by the acts for which Utepova was prosecuted, which were primarily social media posts about DCK and Koshe and which would not foreseeably be understood as participation in party activities.

The lack of any limiting criteria in Article 405(2) thus affords the authorities extensive discretion, making it effective tool in the suppression of dissenting voices. As mentioned above, Utepova's conviction (as is common practice in Kazakhstan), entails a two-year ban on social media or other public commentary, ensuring that she will no longer be able to speak freely or continue her work as a journalist. This, combined with her forced committal and months of house arrest, sends a strong signal to opposition voices in Kazakhstan – to stay silent 'or else.'



A. POLITICAL AND LEGAL CONTEXT

The case against Aigul Utepova reflects several inter-related trends within Kazakhstan: the government's suppression of dissenting voices, persecution of independent journalism, and employment of punitive psychiatry against activists and human rights defenders.

Suppression of Dissenting Voices

As noted by Human Rights Watch, in 2020 “[g]overnment critics [in Kazakhstan] faced harassment and prosecution, and free speech was suppressed, especially in the context of the Covid-19 pandemic.”¹ In its 2020 Country Report on Human Rights Practices in Kazakhstan, the U.S. State Department correspondingly reported that “the government limited freedom of expression ... through a variety of means, including detention, imprisonment, [and] criminal and administrative charges.”²

In this regard, the Kazakh government has utilized vague and overbroad criminal charges to harass and silence dissenters. A common such charge is violation of Article 174,³ which criminalizes “inciting social, national, racial, class, or religious discord.”⁴ In 2016, for example, the Kazakh authorities charged Kuanysh Bashpayev under Article 174 after he criticized, among other things, the state-run Spiritual Administration of Muslims.⁵ In April 2017, he was sentenced to four-and-a-half years in prison⁶ following a closed-court hearing.⁷

¹ Human Rights Watch, “Kazakhstan: Events of 2020”, 2021. Available at <https://www.hrw.org/world-report/2021/country-chapters/kazakhstan#>.

² U.S. Department of State, “2020 Country Report on Human Rights Practices: Kazakhstan”, March 2021, pgs. 18-19. Available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kazakhstan/>.

³ Note that in 2014 Article 174 replaced Article 164, which was identical. Some of the cases enumerated in this report may have been prosecuted under Article 164. Forum 18, “Kazakhstan: Article 174 Cases Increase, Cancer Sufferer Tortured”, March 7, 2017. Available at <https://www.refworld.org/docid/58bfbe4c4.html>.

⁴ Amnesty International, “Kazakhstan: Civil Activist Detained in Psychiatric Facility: Ardak Ashym”, April 26, 2018. Available at <https://www.amnesty.org/download/Documents/EUR5782982018ENGLISH.pdf>.

⁵ Forum 18, “Kazakhstan: Article 174 Cases Increase, Cancer Sufferer Tortured”, March 7, 2017.

⁶ Forum 18, “Germany Rejects Extradition Request”, March 1, 2019. Available at <https://www.ecoi.net/en/document/1458509.html>.

⁷ Forum 18, “Kazakhstan: Article 174 Cases Increase, Cancer Sufferer Tortured”, March 7, 2017.

The Kazakh government has also employed Article 378, which criminalizes the “insult of a state official, with the use of mass media,”⁸ to target activists and critics. In May 2017, trade union leader Amin Yeleusinov⁹ was convicted for, among other things, violating Article 378. As chairman of the Oil Construction Company union, Yeleusinov had led a hunger strike in protest against the forced closure of the federal trade union body, the Confederation of Independent Trade Unions of Kazakhstan. He was sentenced to two years in prison,¹⁰ and banned from engaging in public activities for five years.¹¹ His lawyer, Tolegen Shaiqov, alleged that the proceedings were unfair, citing the judge’s denial of defense motions to “gain access to exculpatory financial documents that had been confiscated.”¹² After sixteen months in prison, Yeleusinov was granted parole and released.¹³

The Kazakh government has likewise cracked down on affiliation with banned opposition parties. Article 405(1) of the Kazakh Criminal Code prohibits the organization of the “activity of [a] public or religious association or other organization, in relation of which there is a court decision, entered into legal force, or prohibition of their activity or liquidation in connection with ... extremism or terrorism,” while Article 405(2) criminalizes participation in said activities. Conviction under Article 405 not only carries the possibility of a two-year prison sentence with respect to Part 2 or a six-year prison sentence with respect to Part 1, but also automatically places an individual on a list of those “connected with the financing of extremism or terrorism,” imposing severe limitations on their personal finances.¹⁴ Individuals on the list have their bank accounts frozen, are blocked from making bank transfers or payments, and are only allowed to withdraw a small amount of money per month.¹⁵

The Kazakh authorities have primarily used Article 405 to target the opposition Democratic Choice of Kazakhstan (DCK) and Koshe parties. In 2018, the Yesil District Court in Nur-Sultan banned the DCK, led by the exiled opposition leader Mukhtar

⁸ Amnesty International, “10 ways Kazakhstan’s New President Can Improve Human Rights”, March 21, 2019. Available at <https://www.amnesty.org/en/latest/campaigns/2019/03/ten-ways-kazakhstans-new-president-can-improve-human-rights/>.

⁹ Note: Also spelled as Amin Eleusinov.

¹⁰ Human Rights Watch, “Kazakhstan: Trade Union Leader Jailed”, May 17, 2017. Available at <https://www.hrw.org/news/2017/05/17/kazakhstan-trade-union-leader-jailed>. See also Open Dialogue Foundation, “The List of Kazakhstani Political Prisoners and Persons Subjected to Politically Motivated Prosecution by Kazakhstan”, October 12, 2017. Available at <https://en.odfoundation.eu/a/8423,the-list-of-kazakhstani-political-prisoners-and-persons-subjected-to-politically-motivated-prosecution-by-kazakhstan/>.

¹¹ Open Dialogue Foundation, “The List of Kazakhstani Political Prisoners and Persons Subjected to Politically Motivated Prosecution by Kazakhstan”, October 12, 2017.

¹² Human Rights Watch, “Kazakhstan: Trade Union Leader Jailed”, May 17, 2017.

¹³ Human Rights Watch, “Trade Union Leaders Freed in Kazakhstan”, June 6, 2018. Available at <https://www.hrw.org/news/2018/06/06/trade-union-leaders-freed-kazakhstan>.

¹⁴ Human Rights Watch, “Kazakhstan: Crackdown on Government Critics”, July 7, 2021. Available at <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics>.

¹⁵ Id.

Abylazarov, and labeled it an “extremist organization”: “[t]he court ruled that the DCK incited social discord, created a negative image of state authorities, and provoked protest.”¹⁶ This decision was not made public.

On May 19, 2020, the Yesil District Court banned the newly formed Koshe Party as “extremist,” finding it to be a “successor organization of the DCK.”¹⁷ This decision was also not made public. As reported by Human Rights Watch,

The decisions to ban the groups were based on state-commissioned psychological-linguistic analyses of the material posted on social media. The court rulings did not cite any other evidence showing that either group had advocated or engaged in violence.¹⁸

As a result of the Yesil court’s decisions banning DCK and Koshe, participation in or organization of their activities is now criminalized under Article 405. Notably, the European Parliament has characterized the DCK and Koshe parties as “peaceful opposition movements.”¹⁹ The U.S. State Department has likewise described the DCK’s declared goal as “peaceful change of the country’s authoritarian regime into a parliamentary republic,” and the Koshe Party’s declared goal as “to change the country into a parliamentary republic, release all political prisoners, and combat corruption.”²⁰

Meanwhile, UN treaty bodies and special procedures have expressed concern regarding the vagueness of Kazakhstan’s anti-extremism legislation and its susceptibility to abuse. Following a visit to Kazakhstan, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted that “dozens of civil society activists, bloggers and religious figures ha[d] been held criminally liable and dozens more arrested and detained under the [Article 405] provisions on extremism,”²¹ stating:

[S]ignificant aspects of the criminal law concerning terrorism and extremism are broad and vaguely defined, impinging directly on fundamental human rights protected by international law, including but not limited to the rights to

¹⁶ U.S. Department of State, “2020 Country Report on Human Rights Practices: Kazakhstan”, March 2021, pg. 40.

¹⁷ *Id.*

¹⁸ Human Rights Watch, “Kazakhstan: Crackdown on Government Critics”, July 7, 2021.

¹⁹ European Parliament, Resolution on the human rights situation in Kazakhstan, 2021/2544(RSP), February 10, 2021, para. 5.

²⁰ U.S. Department of State, “2020 Country Report on Human Rights Practices: Kazakhstan”, March 2021, pg. 40.

²¹ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/HRC/43/46/Add.1, January 22, 2020, para. 22.

expression, movement, family life, and freedom of religion and belief.²²

Similarly, in its most recent Concluding Observations on Kazakhstan, the UN Human Rights Committee denounced “the broad formulation of the concepts of ‘extremism’ ... under the State party’s criminal legislation and the use of such legislation on extremism to unduly restrict freedoms of religion, expression, assembly and association.”²³

The past several years have seen a spate of Article 405 trials. In late 2019, for example, activist Serik Zhakhin was tried under Article 405(2) for posting information about the banned DCK on his Facebook page.²⁴ He was held in pre-trial detention for several months and eventually convicted. The court imposed a fine, one year of restricted movement and a two-year ban on social media use and public activism.²⁵ In November 2020, a Kazakh court likewise convicted teacher and activist Nurbol Onerkhan under Article 405(2)²⁶ for his alleged membership in the DCK. Though Onerkhan had openly criticized the government on social media since 2019, he denied any links to DCK.²⁷ He was given a one-year sentence of restricted movement.²⁸ In May 2021, he was sentenced to six months in prison for violating the terms of this sentence.²⁹

In many such Article 405 trials, government experts play a significant role in assessing the accused’s purported affiliation with a banned organization. In May 2020, for example, blogger Azamat Baikenov was convicted under Article 405(2) for participation in the DCK’s activities. In support of conviction, the prosecution presented a series of private messages and social media posts as well as the conclusions of government experts finding that Baikenov’s posts “formed Kazakhstani citizens’ negative attitude to the authorities and encouraged them to take actions aimed at changing the government.”³⁰

²² Id. at summary.

²³ Human Rights Committee, Concluding Observations on the second periodic report of Kazakhstan, U.N. Doc. A/HRC/43/46/Add.1, August 9, 2016, para. 13.

²⁴ International Partnership for Human Rights, “Kazakhstan: A Tightening Grip on Civil Society: Ongoing Persecution of Activists Across the Country”, January 6, 2020. Available at <https://www.iphronline.org/kazakhstan-a-tightening-grip-on-civil-society-ongoing-persecution-of-activists-across-the-country.html>.

²⁵ U.S. Department of State, “2019 Country Report on Human Rights Practices: Kazakhstan”, March 2020, pg. 15.

²⁶ Helmut Scholz, “List of Individual Cases of Politically Motivated Prosecution, Administrative Arrests and Fines, Abductions and Apparent Abductions of Activists in the Republic of Kazakhstan as of 29 September 2020.” Available at <https://www.helmutscholz.eu/kontext/controllers/document.php/121.c/1/d1af9d.pdf>.

²⁷ Radio Free Europe/Radio Liberty, “‘No Regrets’: Kazakh Activist Continues to Fight Despite Losing his Freedom, Job for Criticizing Government”, February 27, 2020. Available at <https://www.rferl.org/a/kazakh-activist-onerkhan-jailed-loses-job-criticizing-government/30458306.html>.

²⁸ Human Rights Watch, “Kazakhstan: Crackdown on Government Critics”, July 7, 2021.

²⁹ Radio Azattyk, “Активисту Нурболу Онерхану заменили ограничение свободы на тюремное заключение [Restriction of Freedom Replaced with Imprisonment for Activist Nurbol Onerkhan]”, May 4, 2021. Available at <https://rus.azattyq.org/a/31237594.html>.

³⁰ U.S. Department of State, “2020 Country Report on Human Rights Practices: Kazakhstan”, March 2021, pg. 23.

Baikenov pointed to the lack of evidence proving his affiliation with the DCK or propagation of its ideas, and alleged judicial bias.³¹ He was sentenced to one year of restrictions on movement and received a fine.³²

In May 2021, a court sentenced Abaibek Sultanov to one year of restricted movement under Article 405(2) for allegedly participating in the Koshe party's activities. He was also banned from engaging in public and social activism for three years. Sultanov told Human Rights Watch that the court had heavily relied on the government linguistic expert's opinion, which analyzed videos he had posted to his Facebook page and concluded he was a member of Koshe.³³ According to the verdict, Sultanov's videos and posts gave "a negative assessment of the authorities."³⁴

Most recently, in 2021, TrialWatch monitored the trial of activist Askhat Zheksebaev under Article 405(1) and (2). Zheksebaev was prosecuted for his alleged membership in the Koshe party on the basis of "Facebook posts and Telegram messages that encouraged people to join [the] opposition party and attend rallies."³⁵ In November 2021, Zheksebaev was sentenced to five years in prison³⁶ following a flawed trial at which "the judge threatened to revoke the defense lawyers' licenses, interrupted and muted other co-defendants on the stand, and removed one of the defense lawyers from the [proceedings]."³⁷

Persecution of Independent Journalism

The authorities have largely stamped out independent journalism in Kazakhstan. Reporters Without Borders (RSF) ranked Kazakhstan 155/180 in its 2021 World Press Freedom Index, stating that Kazakhstan "[was] modernizing its methods of repression and, in particular, exercising more control over the Internet." RSF further reported that "bloggers ha[d] been jailed or confined to psychiatric clinics" (more on committal to psychiatric clinics below).³⁸ According to Freedom House, in 2020 "[j]ournalists critical of

³¹ Id.

³² Id.

³³ Human Rights Watch, "Kazakhstan: Crackdown on Government Critics", July 7, 2021. See also Qaharman Human Rights Protection Fund, "The Second Court hearing on the Politically Motivated Criminal Case under Article 405 Part 2 against the Civil Activist and Human Rights Defender of the Human Rights Group 'Article 14' Abaibek Sultanov", April 21, 2021. Available at <https://qaharman.fund/en/the-second-court-hearing-on-the-politically-motivated-criminal-case-under-article-405-part-2-against-the-civil-activist-and-human-rights-defender-of-the-human-rights-group-article-14-abaibek-sulta/>.

³⁴ Human Rights Watch, "Kazakhstan: Crackdown on Government Critics", July 7, 2021.

³⁵ Clooney Foundation for Justice, "Five-Year Prison Sentence for Facebook Posts in Kazakhstan", November 23, 2021. Available at https://cfj.org/news_posts/five-year-prison-sentence-for-facebook-posts-in-kazakhstan/.

³⁶ Id.

³⁷ Id.

³⁸ Reporters Without Borders, "Kazakhstan." Available at <https://rsf.org/en/kazakhstan>.

the regime often face[d] harassment. Throughout [the year], several journalists found themselves subject to prospective criminal cases.”³⁹

This crackdown on independent media stretches back more than a decade. In December 2011, Kazakh security forces opened fire on oil workers who were on strike in the industrial town of Zhanaozen, killing at least 12 and wounding dozens. In the months that followed, the government began prosecuting and shutting down media outlets that had reported on the massacre,⁴⁰ alleging that they had “published information that was found to incite social discord and that called for the overthrow of the constitutional order.”⁴¹ As in other cases, the prosecution and courts relied on the opinions of government linguistic experts.⁴²

According to Human Rights Watch, by late 2012 the authorities had shut down “dozens” of newspaper outlets.⁴³ In 2013 and 2014, a further 12 and seven outlets, respectively, were shut down or suspended.⁴⁴ The trend continued into 2015, with the closure of the independent news organization ADAM bol (along with its successor Adam, just months later).⁴⁵ ADAM bol was charged with violating the Kazakh constitution by “propagandizing for war”⁴⁶ on the basis of an interview it published in which an activist called for Kazakh citizens to travel to Ukraine to fight against the Russian occupation of Crimea.⁴⁷

In 2016, independent news site Ratel.kz, along with Forbes Kazakhstan, published corruption allegations against former government minister Zeinulla Kakimzhanov. After Kakimzhanov filed a complaint, the Kazakh authorities charged both outlets with “disseminating knowingly false information” under Article 274 of the Criminal Code.⁴⁸ In March 2018, a Kazakh court issued a preliminary order blocking Ratel.kz and its affiliated

³⁹ Freedom House, “Freedom in the World 2021: Kazakhstan.” Available at <https://freedomhouse.org/country/kazakhstan/freedom-world/2021#PR>.

⁴⁰ Human Rights Watch, “Kazakhstan: Growing Crackdown on Free Speech”, December 13, 2012. Available at <https://www.hrw.org/news/2012/12/13/kazakhstan-growing-crackdown-free-speech>.

⁴¹ Id.

⁴² Id.

⁴³ Human Rights Watch, “Kazakhstan Journal Loses Shutdown Appeal”, February 27, 2015. Available at <https://www.hrw.org/news/2015/02/27/kazakhstan-journal-loses-shutdown-appeal>.

⁴⁴ Id.

⁴⁵ The Guardian, “One After Another, Kazakhstan Shuts Down Independent Media Outlets”, July 8, 2015. Available at <https://www.theguardian.com/world/2015/jul/08/kazakhstan-media-crackdown-independent-press>; Amnesty International, “Kazakhstan: Submission to the United Nations Human Rights Committee”, June 13, 2016. Available at <https://www.amnesty.org/download/Documents/EUR5741222016ENGLISH.pdf>.

⁴⁶ Human Rights Watch, “Kazakhstan Journal Loses Shutdown Appeal”, February 27, 2015.

⁴⁷ Global Freedom of Expression, “The Case of ADAMBol, Kazakhstan’s Independent Newspaper.” Available at <https://globalfreedomofexpression.columbia.edu/cases/adam-bol/>.

⁴⁸ Human Rights Watch, “Kazakhstan: Criminal Probe of Media Outlets”, April 6, 2018. Available at <https://www.hrw.org/news/2018/04/06/kazakhstan-criminal-probe-media-outlets>; Committee to Protect Journalists, “CPJ Joins Call for Kazakhstan to Revise False News Law and Drop Charges Against Critical Media”, May 18, 2018. Available at <https://cpj.org/2018/05/cpj-joins-calls-for-kazakhstan-to-revise-false-new/>.

sites.⁴⁹ Subsequently, police officers searched the Ratel.kz and Forbes Kazakhstan offices, confiscated electronics and bank cards, and detained several staff for questioning.⁵⁰ In May 2018, in separate proceedings regarding “reregistration rules,” a court imposed a one-year ban on Ratel.kz and the use of its domain name on any affiliated websites and banned several former employees from publishing content on other sites “under the name Ratel.kz.”⁵¹

In addition to pursuing court proceedings against media outlets, the authorities have passed legislation restricting independent journalism. In 2018, for example, the Law on the Media was amended to require a journalist to obtain consent from an individual before publishing information of a “personal, family, medical, banking, or commercial nature.”⁵² This amendment makes investigative reporting on corruption – which generally entails examination of an individual’s personal and financial matters – almost impossible.⁵³

The government’s crackdown on media has extended to informal bloggers and social media users, who have been criminally prosecuted for online posts.⁵⁴ In 2020, human rights activist and blogger Alnur Ilyashev was prosecuted under Article 274 for a series of “Facebook posts that criticized the ruling Nur Otan party for corruption and incompetence, including in response to the Covid-19 pandemic.”⁵⁵ The TrialWatch report on the case, by Vania Costa Ramos and staff at the ABA CHR, found that the trial, which resulted in Ilyashev’s conviction and a five-year ban on civic and political activism, was marred by human rights and fair trial violations.⁵⁶

As described by Amnesty International, through such criminal proceedings and other stifling measures, the authorities have ensured that “there are virtually no independent print or internet media outlets operating in Kazakhstan.”⁵⁷

⁴⁹ Human Rights Watch, “Kazakhstan: Criminal Probe of Media Outlets”, April 6, 2018.

⁵⁰ Id; Reporters Without Borders, “‘False Information’ Laws Must Not Be Used to Silence the Media in Kazakhstan”, May 22, 2018. Available at <https://rsf.org/en/news/false-information-laws-must-not-be-used-silence-media-kazakhstan>.

⁵¹ Radio Free Europe/Radio Liberty, “Kazakhstan Shuts Down Independent News Site”, May 28, 2018. Available at <https://www.rferl.org/a/kazakhstan-shuts-down-independent-news-site-ratel/29254964.html>.

⁵² The Diplomat, “With Media Law Amendments, Kazakhstan Deals a Blow to Press Freedom”, January 3, 2018. Available at <https://thediplomat.com/2018/01/with-media-law-amendments-kazakhstan-deals-a-blow-to-press-freedom/>.

⁵³ Id.

⁵⁴ U.S. Department of State, “2019 Country Report on Human Rights Practices: Kazakhstan”, March 2020, pgs. 15-16.

⁵⁵ American Bar Association, “Trial Observation Report: Kazakhstan v. Alnur Ilyashev”, March 11, 2021. Available at https://www.americanbar.org/groups/human_rights/reports/trial-observation-report--kazakhstan-v--alnur-ilyashev/.

⁵⁶ Id.

⁵⁷ Amnesty International, “Think Before You Post: Closing Down Social Media Space in Kazakhstan”, February 9, 2017, pg. 18. Available at <https://www.refworld.org/pdfid/589c6cf44.pdf>.

Punitive Psychiatry

The Kazakh government has exploited legislation permitting the forced confinement of individuals in psychiatric facilities to detain activists and journalists, a phenomenon known as “punitive psychiatry.”⁵⁸ Psychiatric detention – when implemented unjustifiably and arbitrarily – is a political tool for the State to silence dissent, suppress unwanted behavior, and discredit sources of criticism.

Punitive psychiatry was common practice in the former Soviet Union. Individuals who were not mentally ill but had expressed some form of dissent were forcibly committed to psychiatric facilities, including maximum-security institutions.⁵⁹ Generally, authorities would arrest a dissident on a political charge, such as “anti-Soviet agitation and propaganda,” and order a psychiatric evaluation.⁶⁰ After the evaluation, the presiding court would issue a compulsory psychiatric treatment order.⁶¹ Those committed were typically not convicted of the given charges; compulsory treatment orders allowed courts to bypass court proceedings where there was no evidence to make a case.⁶² Though exact numbers are not available, Human Rights Watch has estimated that hundreds of dissidents underwent such treatment.⁶³

Notably, psychiatric detention is a particularly powerful form of detention because its incapacitating impact goes beyond the deprivation of liberty to neutralize the source of rebellion. Imprisoned dissenters may become heroes to their causes, whereas psychiatrically detained dissenters – once perceived as “mentally ill” – are more likely to be stigmatized, disgraced, and subsequently ignored.⁶⁴ Dissent itself becomes a symptom, perceived in the context of stigmatized perspectives of those labeled with – or even suspected of – mental illness.⁶⁵

Punitive psychiatry is pretextual in its application. As noted by mental disability law expert Michael Perlin:

I define pretextuality as the ways in which courts accept – either implicitly or explicitly – testimonial dishonesty and

⁵⁸ Note: also known as “political abuse of psychiatry.”

⁵⁹ Richard J. Bonnie, “Political Abuse of Psychiatry in the Soviet Union and in China: Complexities and Controversies”, *The Journal of the American Academy of Psychiatry and the Law*, 2002, pg. 137. Available at <http://jaapl.org/content/jaapl/30/1/136.full.pdf>.

⁶⁰ See id; Human Rights Watch, “The Legacy of Psychiatric Abuse in the USSR.” Available at <https://www.hrw.org/reports/pdfs/u/ussr/ussr2905.pdf>.

⁶¹ See Human Rights Watch, “The Legacy of Psychiatric Abuse in the USSR,” pg. 11.

⁶² See id. at pgs. 5-6.

⁶³ Id. at pg. 4.

⁶⁴ Michael L. Perlin, “International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent”, *New York Law School Public Law and Legal Theory Series*, 2006, pgs. 76, 91, 96-97.

⁶⁵ Id. at pg. 76.

engage similarly in dishonest and frequently meretricious decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends.⁶⁶

The practice of punitive psychiatry has persisted in post-Soviet states. For example, the Uzbek Forum for Human Rights has documented the forced psychiatric treatment of human rights defenders in Uzbekistan. A 2021 report from the Forum, which identified seven cases of punitive psychiatry, noted:

Because forced psychiatric treatment is often administered in institutions far from any third-party oversight or the watchful eye of family members, patients whether they have a disability or not, are extremely vulnerable to abuse. Moreover, evading accountability for abuse in psychiatric institutions is easier than in a traditional criminal setting, since there is an inclination to disbelieve reports of abuse from an individual who has been declared mentally unstable.⁶⁷

In recent years, the Kazakh authorities have likewise repeatedly forcibly committed human rights activists. Article 279 of the Kazakh Criminal Procedure Code authorizes courts to forcibly commit a suspect in a criminal case for the purposes of observation “when there are doubts about their sanity or ability to defend their rights and legitimate interests in the criminal process.”⁶⁸ Under Article 513 of the Criminal Procedure Code, if a suspect poses a danger to himself or others, a court can order committal in a psychiatric institution as a “security measure.” Meanwhile, Article 170 of the Public Health Code provides for compulsory medical measures, including observation and treatment, where “a person with a mental, behavioral disorder ... has committed socially dangerous acts.” The UN Human Rights Committee has previously raised the issue of the forced psychiatric detention of human rights defenders with Kazakhstan.⁶⁹

The case of lawyer Zinaida Mukhortova is illustrative. In 2009, Mukhortova and three others made a written submission to the Kazakh president and the Public Commission on Combating Corruption alleging that a member of parliament had unlawfully interfered in a civil case.⁷⁰ All four signees were subsequently charged with “false accusations” under

⁶⁶ *Id.* at pg. 74.

⁶⁷ Uzbek Forum for Human Rights, “Punitive Psychiatric Detention in Uzbekistan”, September 21, 2021, pg. 2. Available at <https://www.uzbekforum.org/wp-content/uploads/2021/09/Punitive-Psychiatric-Detention-in-Uzbekistan.pdf>.

⁶⁸ Kazakh Criminal Procedure Code, Article 271(1)(4) – the last section of Article 271 refers to Article 279 for cases where a “stationary forensic psychiatric examination” is needed.

⁶⁹ UN Human Rights Committee, List of issues in relation to the second periodic report of Kazakhstan, U.N. Doc. CCPR/C/KAZ/Q/2/Add.1, April 14, 2016, Issue 15, paras. 90-92.

⁷⁰ Open Dialogue Foundation, “The Case of Zinaida Mukhortova: A Human Rights Defender from Balkhash Has Been Forcibly Admitted to a Psychiatric Hospital”, August 19, 2013. Available at

Article 351 of the Criminal Code.⁷¹ Mukhortova was taken into custody, where she underwent a psychiatric evaluation and was diagnosed with “chronic delusional disorder.”⁷² While the other three accused were convicted and given suspended sentences, Mukhortova was absolved of criminal responsibility due to her diagnosis and forcibly committed to a psychiatric facility in Aktas.⁷³

Mukhortova spent nine months in the facility – from January to September 2011. She alleged that during her detention she was ill-treated by staff, was forced to take pills, and was beaten and tied to her bed for refusing to do so.⁷⁴ In December 2011, just months after her release, she was forcibly committed to the Balkhash psychiatric hospital for two weeks.⁷⁵ In 2012, Mukhortova filed a complaint against the “hospital’s head doctor for unlawfully subjecting her to psychiatric detention.”⁷⁶ The same year, Mukhortova received an independent mental health evaluation from a human rights organization, which concluded that she “did not suffer and does not suffer from any mental disorders either during the period of the alleged [criminal] acts or now.”⁷⁷

In August 2013, Mukhortova was again forcibly detained at the Balkhash psychiatric hospital under court order, in apparent retaliation for her prior complaint against the head doctor.⁷⁸ She was released from detention in November,⁷⁹ subsequently “stay[ing] away from her hometown because she was concerned she might be involuntarily re-hospitalized.”⁸⁰ Although Mukhortova contested the court’s decision to commit her to a psychiatric hospital, the Supreme Court upheld the ruling in May 2014.⁸¹ When Mukhortova returned to Balkhash to see her grandchildren in late June 2014, law

<https://en.odfoundation.eu/a/1240,the-case-of-zinaida-mukhortova-a-human-rights-defender-from-balkhash-has-been-forcibly-admitted-to-a-psychiatric-hospital/>.

⁷¹ Id.

⁷² Human Rights Watch, “Kazakhstan: Lawyer in Forced Psychiatric Detention”, August 15, 2013. Available at <https://www.hrw.org/news/2013/08/15/kazakhstan-lawyer-forced-psychiatric-detention>.

⁷³ Id.; Country of Origin Research and Information, “CORI Thematic Report Mental Health; Kazakhstan”, March 2014. Available at <https://www.refworld.org/docid/539165d74.html>.

⁷⁴ Human Rights Watch, “Kazakhstan: Lawyer in Forced Psychiatric Detention”, August 15, 2013.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Country of Origin Research and Information, “CORI Thematic Report Mental Health; Kazakhstan”, March 2014.

⁸⁰ Human Rights Watch, “Dispatches: Abuse, Detention, Occupation Hazards in Kazakhstan”, July 9, 2014. Available at <https://www.hrw.org/news/2014/07/09/dispatches-abuse-detention-occupational-hazards-kazakhstan>.

⁸¹ Id.

enforcement officials again detained and forcibly committed her to the Balkhash hospital.⁸² She was released in December 2014.⁸³

During the same period in which Mukhortova was forcibly committed, Aleksandr Kharlamov, an openly atheist journalist and civil rights activist, was charged with “inciting religious discord” under Article 174⁸⁴ for publishing an article on world religions and atheism.⁸⁵ Kharlamov had also frequently blogged about government corruption, including police abuses.⁸⁶ In April 2013, he was forcibly committed to a psychiatric institution for observation.⁸⁷ Kharlamov said that investigators took action “once they realized their legal case was flimsy.”⁸⁸ In May he was released, declared mentally healthy, and kept under house arrest pending trial.⁸⁹ In April 2018, authorities closed the case against Kharlamov, and a Kazakh court subsequently provided him with financial compensation for his psychiatric detention.⁹⁰

In another example, Ardak Ashim,⁹¹ an opposition activist and blogger, was arrested under charges of “inciting social discord” under Article 174 – though the charges were later changed to insulting a public official under Article 378 – in March 2018 for a series of Facebook posts in which she criticized the government. Upon arresting Ashim, police ordered a psychiatric examination.⁹² Following the examination, which diagnosed Ashim with “episodic paranoid schizophrenia,” a court ruled that she should be forcibly committed to a psychiatric institution.⁹³ Ashim alleged ill-treatment by staff during her stay

⁸² Id; Radio Free Europe/Radio Liberty, “Embattled Kazakh Lawyer Again Placed in Psychiatric Clinic”, July 2, 2014. Available at <https://www.rferl.org/a/mukhortova-rights-clinic-balkash-kazakhstan/25442715.html>.

⁸³ Radio Free Europe/Radio Liberty, “Embattled Kazakh Lawyer Released from Psychiatric Clinic”, December 16, 2014. Available at <https://www.rferl.org/a/embattled-kazakh-lawyer-released-from-psychiatric-clinic/26746355.html>; Freedom House, “Nations in Transit 2015: Kazakhstan.” Available at <https://freedomhouse.org/country/kazakhstan/nations-transit/2015>.

⁸⁴ At the time, the charge was under Article 164, but the number has been changed here to reflect the current Criminal Code of Kazakhstan, as previously mentioned.

⁸⁵ Human Rights Watch, “Kazakhstan: Drop Religious Incitement Charges”, May 21, 2013. Available at <https://www.hrw.org/news/2013/05/21/kazakhstan-drop-religious-incitement-charges>.

⁸⁶ Id; Radio Free Europe/Radio Liberty, “Detained RFE/RL Kazakh Correspondent Released”, May 22, 2013. Available at <https://www.rferl.org/a/kazakhstan-rferl-correspondent-detained/24993590.html>; Country of Origin Research and Information, “CORI Thematic Report Mental Health; Kazakhstan”, March 2014.

⁸⁷ Radio Free Europe/Radio Liberty, “Detained RFE/RL Kazakh Correspondent Released”, May 22, 2013.

⁸⁸ Country of Origin Research and Information, “CORI Thematic Report Mental Health; Kazakhstan”, March 2014, pg. 36.

⁸⁹ Id.

⁹⁰ Human Rights Watch, “Kazakhstan: Events of 2018”, 2019. Available at <https://www.hrw.org/world-report/2019/country-chapters/kazakhstan>; Forum 18, “Cancer Sufferer Freed, Other Cases Continue”, April 5, 2018. Available at https://www.forum18.org/archive.php?article_id=2366.

⁹¹ Also known as Ardak Ashym.

⁹² Amnesty International, “Kazakhstan: Civil Activist Detained in Psychiatric Facility: Ardak Ashym”, April 26, 2018. Available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR5782982018ENGLISH.pdf>.

⁹³ Id.

at the facility.⁹⁴ She was released in May 2018.⁹⁵ Soon thereafter, the court “ruled to exempt her from responsibility,” stating that Ashim “was in a ‘state of insanity’ while she committed the alleged crime” and ordering “further psychiatric treatment.”⁹⁶ Ashim subsequently left Kazakhstan for Ukraine “to avoid a second forced hospitalisation.”⁹⁷

In April 2020, activist and Koshe member Asanali Suyubayev⁹⁸ was committed to a psychiatric facility for treatment after being arrested for distributing pro-Koshe party leaflets.⁹⁹ He was reportedly detained at the facility despite the lack of a court order.¹⁰⁰ Notably, the day before his detention, Suyubayev had called for the release of another civil society activist from a psychiatric institution.¹⁰¹ Suyubayev was released in May 2020, two days after he filed a lawsuit seeking to invalidate his committal.¹⁰²

In December 2020 Suyubayev was again committed to a psychiatric facility after being accused of tearing down posters of the ruling Nur-Otan party. The committal occurred a few weeks before the parliamentary election.¹⁰³ Suyubayev was released on January 11, 2021, the day after the election.¹⁰⁴

⁹⁴ Open Dialogue Foundation, “Report: The List of Kazakhstani Political Prisoners and Other Victims of Politically Motivated Prosecutions (Updated)”, April 27, 2018. Available at <https://en.odfoundation.eu/a/8625,report-the-list-of-kazakhstani-political-prisoners-and-other-victims-of-politically-motivated-prosecution-updated/>.

⁹⁵ International Partnership for Human Rights, “Kazakhstan: Closure of Independent Media and Peaceful Protests Hampered”, July 17, 2018. Available at <https://www.iphronline.org/kazakhstan-closure-of-independent-media-and-peaceful-protests-hampered.html>.

⁹⁶ Id.

⁹⁷ Open Dialogue Foundation, “Ukrainian Migration Service Denies Asylum to Victims of Political Persecution Zhanara Akhmetova and Ardak Ashim”, March 19, 2019. Available at <https://en.odfoundation.eu/a/9180,ukrainian-migration-service-denies-asylum-to-victims-of-political-persecution-zhanara-akhmetova-and-ardak-ashim/>.

⁹⁸ Asanali can also be spelled Assanali, and Suyubayev can be spelled as Suyubaev.

⁹⁹ Radio Free Europe/Radio Liberty, “Kazakh Activist Placed in Psychiatric Clinic, Lawyer Warns of Opposition Sweep Ahead of Vote”, December 22, 2020. Available at <https://www.rferl.org/a/kazakh-activist-suyubayev-psychiatric-clinic-loppeposition-sweep-election/31013916.html>; Kazakhstan International Bureau for Human Rights and Rule of Law, “Asanali Onalbayevich Suyubayev.” Available at <https://cv.bureau.kz/eng/cases/asanali.html>.

¹⁰⁰ CIVICUS, “Massive Restrictions on Expression During Covid-19; Sudden Banning of Opposition”, August 24, 2020. Available at <https://monitor.civicus.org/updates/2020/08/24/massive-restrictions-expression-during-covid-19-sudden-banning-peaceful-opposition/>.

¹⁰¹ Kazakhstan International Bureau for Human Rights and Rule of Law, “Asanali Onalbayevich Suyubayev.”

¹⁰² Id; Radio Free Europe/Radio Liberty, “Kazakh Activist Placed in Psychiatric Clinic, Lawyer Warns of Opposition Sweep Ahead of Vote”, December 22, 2020.

¹⁰³ Radio Free Europe/Radio Liberty, “Kazakh Activist Placed in Psychiatric Clinic, Lawyer Warns of Opposition Sweep Ahead of Vote”, December 22, 2020; International Crisis Group, “Crisis Watch Global Overview, December 2020.” Available at <https://www.crisisgroup.org/crisiswatch/january-2021-alerts-and-december-trends-2020>.

¹⁰⁴ Twitter, Assanali Suyubaev Post, February 23, 2021. Available at <https://twitter.com/AssanaliSyubaev/status/1364151183485599748?s=20>; Twitter, Human Rights Movement 405 Post, January 19, 2021. Available at <https://twitter.com/hr405kz/status/1351599422610747399?s=20>; Twitter, Qaharman Post, January 14, 2021. Available at https://twitter.com/qaharman_kz/status/1349752608853008384?s=20.

Due Process and Fair Trial Rights

International and domestic organizations and institutions have raised concerns about Kazakhstan's respect for due process and fair trial rights. At the pretrial stage, Freedom House has stated that "police reportedly engage in arbitrary arrests and detentions, and violate detained suspects' right to assistance from a defense lawyer."¹⁰⁵ In its 2020 report on human rights practices in Kazakhstan, the U.S. State Department likewise described detainees as "constrained in their ability to communicate with their attorneys."¹⁰⁶ According to Freedom House, pretrial detention is often lengthy.¹⁰⁷ There have been reports of poor conditions in detention, including lack of access to medical care and physical abuse.¹⁰⁸

Judicial independence is also of concern. As noted in the 2020 State Department report: "[t]he executive branch ... sharply limited judicial independence ... Prosecutors enjoyed a quasi-judicial role and had the authority to suspend court decisions ... Corruption was evident at every stage of the judicial process."¹⁰⁹ In its most recent Concluding Observations on Kazakhstan, the United Nations Human Rights Committee stated that it "remain[ed] concerned ... that the independence of the judiciary [was] not sufficiently secured under the law and in practice," highlighting the lack of safeguards against "undue influence" from the executive branch as well as low rates of acquittal.¹¹⁰

The Committee further remarked on non-compliance with the principle of equality of arms, describing the prosecution as "retain[ing] wide powers" in criminal proceedings.¹¹¹ The U.S. State Department has similarly cited challenges facing defense lawyers, including "lack of access to government-held evidence, frequent procedural violations, [and] denial of defense counsel motions."¹¹² The trial of activist Alnur Ilyashev, monitored by ABA CHR as part of TrialWatch, highlighted such issues. The Fairness Report on the case, by TrialWatch Expert Vania Costa Ramos and staff at ABA CHR, found that the court had "continuously issued unreasoned rulings to the detriment of the defense, severely

¹⁰⁵ Freedom House, "Freedom in the World 2021: Kazakhstan."

¹⁰⁶ U.S. Department of State, "2020 Country Report on Human Rights Practices: Kazakhstan", March 2021, pg. 9.

¹⁰⁷ Freedom House, "Freedom in the World 2021: Kazakhstan."

¹⁰⁸ Id; Radio Free Europe/Radio Liberty, "Kazakh Prisoners Packed in Cells, Endure 'Degrading' Conditions During Coronavirus Lockdown", September 14, 2020. Available at <https://www.rferl.org/a/kazakh-prisoners-packed-in-cells-endure-degrading-conditions-in-coronavirus-lockdown/30838547.html>; Human Rights Committee, Concluding Observations on the Second Periodic Report of Kazakhstan, U.N. Doc. CCPR/C/KAZ/CO/2, August 9, 2016, paras. 31–32; U.S. Department of State, "2020 Country Report on Human Rights Practices: Kazakhstan", March 2021, pgs. 4-6.

¹⁰⁹ U.S. Department of State, "2020 Country Report on Human Rights Practices: Kazakhstan", March 2021, pg. 11.

¹¹⁰ Human Rights Committee, Concluding Observations on the Second Periodic Report of Kazakhstan, U.N. Doc. CCPR/C/KAZ/CO/2, August 9, 2016, para. 37.

¹¹¹ Id.

¹¹² U.S. Department of State, "2020 Country Report on Human Rights Practices: Kazakhstan", March 2021, pg. 14.

undermining Ilyashev's ability to make his case and violating the guarantee of judicial impartiality" and had convicted Ilyashev despite a lack of evidence, violating the presumption of innocence.¹¹³

In Ilyashev's case the court based its decision almost exclusively on the opinion of a political science expert for the prosecution. International bodies have characterized the weight afforded government expert opinions as an equality of arms issue. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for example, has cited "an overreliance on 'judicial experts,'" and has noted that the weight courts give to their opinions "per se violates the principle of equality of arms and has profound implications on fair trials."¹¹⁴

It was against this backdrop that Utepova's arrest and trial took place.

¹¹³ American Bar Association, "Trial Observation Report: Kazakhstan v. Alnur Ilyashev", March 11, 2021.

¹¹⁴ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/HRC/43/46/Add.1, January 22, 2020, para. 39.

B. CASE HISTORY

Aigul Utepova is a well-known Kazakh freelance investigative journalist who has worked for the independent online outlets *NewTimes.KZ* and *Saryagash Info* in addition to publishing content on her Facebook account and YouTube channel, *Aigul TV*, each of which has 8,000 followers.¹¹⁵ Utepova's reporting has addressed social and political issues, including the government's response to COVID-19.¹¹⁶

Alleged Extremism

On September 15, 2020, a criminal investigation against Utepova was opened under Article 405(2) of the Criminal Code on the basis of her supposed participation in the activities of the banned DCK and Koshe opposition parties.¹¹⁷ As mentioned above, DCK and Koshe were deemed extremist and banned by the Yesil District Court of Nur-Sultan on, respectively, March 13, 2018 and May 18, 2020.

According to the indictment (issued on February 16, 2021), Utepova knowingly used her social media pages to distribute "agitation and propaganda materials" supporting the DCK and Koshe parties.¹¹⁸ The indictment describes the primary objectives of DCK and Koshe as "form[ing] a negative image of power, of individual bodies and officials, incit[ing] social hatred, violent seizure of power and changes in the constitutional order of the Republic of Kazakhstan."¹¹⁹

The indictment lists several acts allegedly committed by Utepova as evidence "establish[ing] that [she] actively participate[d] in the activities of the extremist organizations,"¹²⁰ including:

1. On New Year's Eve of 2019, Utepova attended a party at which she stated during a toast that she hoped that Mukhtar Ablyazov – the co-founder and leader of DCK – would be able to return to Kazakhstan: specifically, "Mukhtar aha, I will pray that the circumstances will turn out so that you will come back home (to Kazakhstan) on horseback and with a shield! Hope that everything is perfect! And I also wanted to say: You are my brother, and I am your

¹¹⁵ See Amnesty International, "Urgent Action: Blogger Detained in Psychiatric Hospital", November 23, 2020. Available at <https://www.amnesty.org/en/documents/eur57/3375/2020/en/>; Committee to Protect Journalists, "Aigul Utepova." Available at <https://cpj.org/data/people/aigul-utepova>; Monitor's Notes, April 20, 2021.

¹¹⁶ See The Coalition for Women in Journalism, "Kazakhstan: House Arrest of Journalist Aigul Utepova Causes Impediment of her Work", September 22, 2020. Available at <https://www.womeninjournalism.org/threats-all/kazakhstan-house-arrest-of-journalist-aigul-utepova-causes-impediment-of-her-work?rq=kazakhstan>; Committee to Protect Journalists, "Aigul Utepova."

¹¹⁷ Deputy Prosecutor of Nur-Sultan, Indictment, February 16, 2021; Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. 7195-20-00-2-3m/6128, November 11, 2020.

¹¹⁸ Deputy Prosecutor of Nur-Sultan, Indictment, February 16, 2021.

¹¹⁹ *Id.*

¹²⁰ *Id.*

weapon!”¹²¹ Ablyazov has been granted political asylum in France, where he currently resides.¹²²

2. On January 14, 2020, Utepova published on Facebook that: “Therefore, my choice is the party ‘KOSHE,’ which means ‘Street’ party. Absolutely every caring citizen can be a member of this party.”¹²³
3. On May 19, 2020, she sewed hats featuring the Koshe logo, which she sold on social media or gave away to members of the organization. She subsequently posted a photo of herself and others wearing the hats at a demonstration in front of the Saryarka District prosecutor’s office.¹²⁴
4. On July 19, 2020, Utepova posted the following question on Facebook: “What if I say that I support DCK, would anyone be surprised?”¹²⁵
5. On August 6, 2020, Utepova called for a rally on Facebook, stating, “Dear friends! I call everyone to a rally tomorrow, August 7, at 10:00 a.m. Rally theme: ‘Shal ket, fuck you.’ Place for the rally: in front of the ‘Domashny’ store on Abai Avenue – the corner of Zhubanov Street, Nur-Sultan. The organizer of the meeting – ME.”¹²⁶
6. On August 22, 2020, Utepova again posted on Facebook that “There is an antivirus. And it’s called DCK.”¹²⁷
7. On September 12, 2020, Utepova made a post on Facebook titled “Lessons of courage and bravery from Ablyazov.”¹²⁸
8. Utepova was a member of and active participant in a “Koshe Partysy” group message on Telegram and WhatsApp.¹²⁹

The indictment concludes that “[b]y posting such materials, Utepova ... demonstrates how much she is an adherent of” and “systematically promotes ideological views of” the banned movements, as well as being “loyal to their leader M. Ablyazov.”¹³⁰ It is of note that although the Yesil District Court order banning Koshe came down on May 18, 2020, the order did not go into effect until later (see discussion below).

In reaching the conclusion that Utepova violated Article 405, the indictment heavily relies on “complex forensic psychophilological examination” No. 2378, which “established” that although the examined materials contained “no calls for the violent overthrow or change

¹²¹ Id.

¹²² Le Monde, “France grants political asylum to kazakh main opponent”, October 5, 2020. Available at https://www.lemonde.fr/international/article/2020/10/05/la-france-accorde-l-asile-politique-au-principal-opposant-kazakh_6054817_3210.html.

¹²³ Deputy Prosecutor of Nur-Sultan, Indictment, February 16, 2021.

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id.

of the constitutional order or for the forced violation of the unity and integrity of the territory,” the “presence of critical information ... has a dysfunctional effect, leading to the formation of a critical attitude towards the current authorities.”¹³¹ As detailed in the indictment, the expert opinion specified that the materials posted by Utepova could “psychological[ly] impact” both those who agreed with her opinions already and those “who d[id] not have a sufficient degree of criticality, self-criticism, or [we]re biased towards the information presented.”¹³²

Other expert findings included: i) that “there [was] a similarity between the content of the materials presented and the ideas of the extremist organizations” DCK and Koshe; ii) that Utepova’s words (although not calling for violent overthrow of the government) did call for violations of public order and “antisocial actions” such as rallies; and iii) that the materials showed signs of participation in, but not organization of, both movements.¹³³

Arrest and Detention

Utepova was arrested and detained on September 17, 2020 and her apartment was searched, with the police confiscating her phone and computer. The detention protocol issued by the investigator stated that it was necessary to preliminarily detain Utepova because she “m[ight] escape the body of pre-trial investigation and the court” and “being at large, m[ight] interfere with the objective investigation of a criminal case.”¹³⁴ On September 19, an investigator requested that Utepova be placed under house arrest for two months – until November 17 – as a preventive measure.¹³⁵ As grounds for this request, the investigator stated: “Taking into account that the suspect Utepova A.D. is suspected of a crime constituted by article 405 part 2 of the Criminal Code of the Republic of Kazakhstan where the penalty is up to two years of imprisonment, a preventive measure can be selected for her in the form of house arrest, [and] because she is a permanent resident of Nursultan [indicating that this was why house arrest, not pretrial detention was chosen].”¹³⁶

An investigating judge of the Specialized Inter-district Investigative court of Nur-Sultan subsequently approved the request, basing its decision on “the severity [level] of suspicion and the presence of a permanent place of residence” and that Utepova was

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ Investigative Division of the Police Department of Nur-Sultan, Protocol of detention of the person suspected of committing a criminal offence, September 17, 2020.

¹³⁵ Investigative Division of the Police Department of Nur-Sultan, Request for the Preventive Measure of House Arrest, September 19, 2020.

¹³⁶ Id.

“suspected of a deliberate minor crime [again indicating that this was why house arrest, not pretrial detention was chosen].”¹³⁷

Following this decision, the authorities continued to request extensions of house arrest as the pretrial investigation continued, all of which were approved by the investigative court, meaning that Utepova remained under house arrest until her trial started and throughout the trial – a total of seven and a half months. The approvals largely stated that “the circumstances and conditions for applying house arrest [had] not changed.”¹³⁸ Notably, in a number of these decisions the court stated that it had not “established any exceptional circumstances preventing the suspect from being under house arrest.”¹³⁹

In addition to house arrest, over the course of the investigation Utepova was subject to forced detention in a psychiatric clinic. On September 23, 2020, the presiding investigator ordered that Utepova undergo a “comprehensive forensic psychological and psychiatric examination.”¹⁴⁰ According to defense counsel, there was no indication that Utepova was suffering from a psychosocial disability.¹⁴¹

Among the questions asked by the investigator to the expert examiners were:

Does Utepova A.D. suffer from any mental disorder, if so, which one?
Is Utepova A.D. in a temporary disease state?
Does the examined person, Utepova A.D., tend to lie?
Is Utepova A.D. mentally ill and must compulsory medical measures be imposed on her?¹⁴²

¹³⁷ Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. 7195-20-00-2-3m/5060, September 20, 2020.

¹³⁸ Specifically, requests to extend Utepova’s house arrest were approved by an investigating judge on the Specialized Inter-district Investigative Court of Nur-Sultan on November 16, 2020 (stating that “[t]here are no grounds for changing it to another type of preventive measure or its cancellation. To date, the circumstances and conditions for applying house arrest have not changed, they have remained the same as when authorizing this measure of restraint.”); on December 9, 2020 (stating that “[t]aking into account the above, the absence of circumstances that would change the conditions of the previous measure of restraint, the severity and public danger of suspicion, as well as the need for further investigative actions, the court concludes that the petition is justified.”); on January 6, 2021 (stating that “[t]aking into account the above, the absence of circumstances that would change the conditions of the previous measure of restraint, the severity and public danger of suspicion, as well as the need for further investigative actions, the court concludes that the petition is justified.”); and on February 12, 2021 (stating that “the court sees no grounds for changing or canceling the measure of restraint, since the severity of the suspicion and the above circumstances remained unchanged ... [and] because ... the persons participating in the case continued to get acquainted with the case materials”).

¹³⁹ See Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. No. 7195-21-00-3m/50, January 6, 2021.

¹⁴⁰ See Investigative Division of the Police Department of Nur-Sultan, Request to Extend Pretrial Investigation, December 7, 2020; Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 538, October 28, 2020.

¹⁴¹ Defense Appeal on Appointment of Utepova for Psychiatric Examination.

¹⁴² Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 538, October 28, 2020.

The examination of Utepova took place October 28, 2020.¹⁴³ The psychiatric experts concluded that it was

not possible to unequivocally answer the questions posed by the investigator, due to the limited time for carrying out the outpatient forensic complex psychological and psychiatric examination. For a more complete examination of the mental activity of Utepova A.D., for conducting clinical and paraclinical examinations, the experimental psychic examination (EPI) in dynamics, it is recommended to place her in a general-type psychiatric hospital at the place of residence, for the purpose of examining and diagnosing, with subsequent submission to an outpatient judicial complex psychological psychiatric examination with the medical documentation from the hospital.¹⁴⁴

On November 10, 2020, the investigator, supported by the prosecution, requested that the court commit Utepova to a psychiatric institution for extended psychological and psychiatric examination:¹⁴⁵ Utepova had allegedly refused to undergo further examination.¹⁴⁶ Under Article 271(4) of the Kazakh Criminal Procedure Code, “[a]ppointment and production of an examination is mandatory, if it is necessary to find in the case ... [the] mental or physical condition of the suspected, the accused when there are doubts about their sanity or ability to defend their rights and legitimate interests in the criminal process.” Article 271 further specifies that if “the expert [finds] the impossibility of giving a conclusion without a stationary forensic psychiatric examination and placement of the patient,” then an accused can be forcibly committed to a facility for examination. Article 279 of the Code establishes the procedure for such committal, stating that “[i]f the forensic examination in respect of a person involves conducting forensic research in the hospital, the suspected, the victim, a witness may be placed in a medical organization on the basis of a decision on the appointment of the examination.” The court granted the prosecutor’s petition for Utepova’s forced committal on November 11, ordering that she be held in a psychiatric hospital until December 11, 2020.¹⁴⁷

However, instead of basing its decision on the need for Utepova’s examination, the court ordered Utepova’s detention in the hospital as a preventive security measure.¹⁴⁸ Under

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Judicial Collegium for Criminal Cases of the Court of Nur-Sultan, Ruling No. 1am-1184/2020, November 19, 2020.

¹⁴⁶ Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. 7195-20-00-2-3m/6179, November 16, 2020.

¹⁴⁷ Id.; Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. 7195-20-00-2-3m/6128, November 11, 2020.

¹⁴⁸ Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. 7195-20-00-2-3m/6128, November 11, 2020.

Article 513 of the Criminal Procedure Code, “[t]he investigating judge according to the nature of the disease, a danger to him(her)self or others, the recommendations of a psychiatric expert shall decide” on committing a suspect to a psychiatric institution as a “security measure.” According to defense counsel, the court’s ruling meant that Utepova was treated like a “dangerous criminal” in the psychiatric hospital, including being watched by a guard.

In response to a complaint against the November 11 decision filed by defense counsel, as well as a prosecution petition stating that the investigative court erred in imposing preventive security measures on Utepova,¹⁴⁹ a judge amended the ruling to “exclude the application of the safety measure,” finding that it exceeded the investigator’s request.¹⁵⁰ The judge, however, authorized Utepova’s continued observation and examination, with the result that she was forced to remain at the facility.¹⁵¹ Utepova was released on December 11, 2020.¹⁵² The psychiatric examination conducted at the facility determined that Utepova was “mentally healthy” and “does not suffer from any mental disorder.”¹⁵³

During the investigation, the authorities undertook several surveillance measures. On September 16, 2020, the Inter-district Investigative Court of Nur-Sultan authorized covert audio and/or video surveillance at Utepova’s home for one month. This decision was based on the monitoring of Utepova’s Facebook page, which the order stated contained “destructive materials against the authorities of the Republic of Kazakhstan partially outlining calls for an illegal rally.”¹⁵⁴ A second court order authorizing covert audio and/or video surveillance, identical to the previous order, was issued on September 18, 2020.¹⁵⁵

The Trial

The prosecutor filed formal charges under Article 405(2) on February 16, 2021 and Utepova’s trial began on March 15, 2021 before the Saryarka District Criminal Court in Nur-Sultan.¹⁵⁶ It was held over Zoom. At the March 15 hearing, Utepova pled not guilty and asked the judge to allow her to take 5–10 minute daily walks while the trial was ongoing, as she remained under house arrest.¹⁵⁷ The judge replied that the court “cannot change the preventative measure until the final decision on the case.”¹⁵⁸ At this same hearing, defense counsel argued that the Koshe ban did not come into effect until August

¹⁴⁹ Judicial Collegium for Criminal Cases of the Court of Nur-Sultan, Ruling No. 1am-1184/2020, November 19, 2020.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Monitor’s Notes, March 15, 2021.

¹⁵³ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 735, December 7, 2020.

¹⁵⁴ Inter-District Investigative Court of Nur-Sultan, Court Resolution on conducting covert audio and (or) video surveillance of a person or place (NSD-1), September 16, 2020.

¹⁵⁵ Inter-District Investigative Court of Nur-Sultan, Court Resolution on conducting a covert penetration and/or site examination (NSD-6), September 18, 2020.

¹⁵⁶ Monitor’s Notes, March 15, 2021.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

6, 2020, after Utepova's alleged acts, and requested that the prosecutor clarify when the Koshe ban took effect.¹⁵⁹ The judge stated that the prosecutor would "clarify it in the course of the trial."¹⁶⁰

On March 25, 2021, the defense raised concerns regarding procedural irregularities, including the alleged retrieval of information from Utepova's phone and computer without a court order.¹⁶¹ In this regard, the defense moved to question one of the lead investigators, Ospanov (first name unknown).¹⁶² The defense also reiterated the prosecutor's obligation to clarify the date of the Koshe ban.¹⁶³ The prosecutor responded that clarification would be provided at the next session.¹⁶⁴

At the hearing on April 5, 2021, witnesses were slated to testify. First, investigator Bagdaulet Maksatuly appeared online but refused to answer any of the defense lawyer's questions and subsequently went offline.¹⁶⁵ The court did not intervene. Second, the judge announced that Saltanat Tolegenovna Barykbaeva, one of the psychiatrists who conducted the forensic examination relied upon to involuntarily commit Utepova to a psychiatric to hospital, had refused to testify.¹⁶⁶ No explanation was provided.

On April 7, 2021, the defense examined expert Yerkesh Kubzhanuly Kozhbanhan, a doctoral student in political science.¹⁶⁷ Kozhbanhan had provided a political science analysis of Utepova's alleged acts in connection with expert opinion no. 2378 (for which a psychological expert and philological expert also provided analyses), in which he concluded that "the content of the submitted materials contains statements and calls for social unrest, for a change in the political regime in the country, which undermine social harmony and political stability, thereby aggravating the socio-political situation"; that "there is a continuity of the research materials and the program goals and objectives of the extremist organizations 'DCK' and 'Koshe partiasy,' as well as a continuity in the forms and methods of their action, as well as the degree of co-organization"; and that Utepova was loyal to Ablyazov.¹⁶⁸ Defense questioning centered on Kozhbanhan's experience.¹⁶⁹ With respect to the substance of the opinion, Kozhbanhan stood by his findings, stating, among other things: "Aigul made calls for the DCK and was slanderous of statesmen, which is a component of extremism."¹⁷⁰

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Monitor's Notes, March 25, 2021.

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Monitor's Notes, April 5, 2021.

¹⁶⁶ Id.

¹⁶⁷ Monitor's Notes, April 7, 2021.

¹⁶⁸ Expert Conclusion No. 2378, December 31, 2020.

¹⁶⁹ Monitor's Notes, April 7, 2021.

¹⁷⁰ Id.

On April 13, 2021, the defense examined political science expert Bagysh Akhmetovna Gabdullina, who had provided an opinion in the initial stages of the investigation, finding, among other things, that “[t]he content of the submitted materials contains statements and calls for social unrest, for a change in the political regime in the country, which undermine social harmony and political stability, thereby aggravating the socio-political situation” and that “the materials contain propaganda activities of the idea and symbols of ‘DCK’ and ‘Koshe Party,’ as well as a call to join and organize or participate in the activities of ‘DCK’ and ‘Koshe Party.’”¹⁷¹

In response to defense questions about how she conducted her analysis and what materials she relied on, Gabdullina stated she was unable to answer as she had “g[iven] back to the investigation the materials, which were in hard copy, so [she] [could] not say anything.”¹⁷² When asked further about her methodology, Gabdullina replied: “I will not tell you anything, since I have no materials on hand which I returned to the police.” Defense counsel requested re-examination of the witness at a later time so that she could review the materials at issue and adequately prepare for questioning. The court denied the request, ordering defense counsel to ask the witness all relevant questions at that day’s hearing.¹⁷³ Notably, Gabdullina described her opinion as an “initial study,” not a conclusion, and stated that her degree was in history, not political science.¹⁷⁴

Upon questioning by the prosecutor about the potential impact of Utepova’s online statements, Gabdullina answered that they “could cause a resonance ... [toward] the government.”¹⁷⁵ When defense counsel asked Gabdullina to provide a more specific answer, she did not respond.¹⁷⁶ The judge then stated that Gabdullina could sign off.¹⁷⁷

At the conclusion of the hearing, the defense requested that the court allow examination of the experts who conducted the psychiatric examination on October 28, 2020, the experts who conducted the psychiatric examination on December 11, 2020, the psychological expert and philological expert who contributed analyses to expert opinion no. 2378, and Ospanov, one of the lead investigators.¹⁷⁸ The court rejected the petition, ruling: “the experts gave their conclusions, they were announced during the court session. This will lead to an unreasonable delay in the trial. For a call to the operative, please contact the Police Department.”¹⁷⁹

¹⁷¹ Conclusion of a Political Scientist, September 18, 2020.

¹⁷² Monitor’s Notes, April 13, 2021.

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Id.

On April 14, 2021, the court reviewed the initial investigative report produced by Ospanov, with the defense highlighting Ospanov’s conclusions that Utepova had published criticism with a “destructive attitude” and questioning “the border between destructiveness and criticism.”¹⁸⁰ The judge reprimanded defense counsel, stating that such objections and arguments should be saved for the “debate” stage of the proceedings.¹⁸¹ The court then reviewed audio recordings of conversations between Utepova and others about “events in the Republic of Kazakhstan” as well as the relationships amongst opposition activists.¹⁸²

On April 20, 2021, Utepova took the stand.¹⁸³ She testified that she had made many of the posts at issue in order to better understand for journalistic purposes why the DCK and Koshe movements appealed to the people of Kazakhstan, describing the posts as a “veiled survey.”¹⁸⁴ With respect to her call for a rally, she testified that she made clear it was a charade – there was no reference to any political movement and the location of the protest was a grocery stall.¹⁸⁵ According to Utepova, her goal was to see whether the police would respond to a patently apolitical and non-violent protest and to thereby evaluate whether the right to peaceful assembly existed in Kazakhstan.¹⁸⁶ With respect to the post “Lessons of courage and bravery from Ablyazov,” Utepova characterized it as a hidden critique of Ablyazov’s co-opting of Koshe (Utepova stated that Koshe was initially a “people’s movement” and “a great community of civic activists), as evidenced by the caricatures of Ablyazov she included in the piece.¹⁸⁷ And finally, Utepova testified that she participated in the 2019 New Year’s Eve celebration mentioned in the indictment without knowledge that there would be a live broadcast attended by Ablyazov and that when she gave her toast, it “contained no names of political organizations, [and] no appeals” but only the “usual[] words that are spoken at weddings.”¹⁸⁸

On April 28, 2021, the prosecution presented closing arguments, dismissing Utepova’s claims that she posted materials for the purposes of investigative journalism and stating that her “active” participation in DCK and Koshe was evidenced by the referenced expert opinions.¹⁸⁹ According to the prosecution, Utepova’s publications “form[] the protest

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² Id.

¹⁸³ Monitor’s Notes, April 20, 2021.

¹⁸⁴ Id.

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ Monitor’s Notes, April 28, 2021.

mood of her listeners and her fans.”¹⁹⁰ The prosecution requested that the court impose a sentence of restricted movement and a ban on social media activities.¹⁹¹

As stated by the prosecution:

I never understood those ‘DCK’ people protesting against the authorities. They are always without a motive. I never heard that they helped in the communal services, took out the garbage, and worked. They have no motive or purpose. Therefore, I think the restriction of freedom would be a fair punishment. These parties have no purpose.¹⁹²

Defense counsel responded that the expert opinions were unreliable because the experts did not “know their subject matter.”¹⁹³ The defense further stated that Utepova was being prosecuted for her journalistic work and for expressing her opinions, in violation of her rights.¹⁹⁴

The Verdict

On April 29, 2021, the court delivered its verdict, pronouncing Utepova guilty and sentencing her to “restriction of freedom for a period of 1 year, with the establishment of probation supervision, depriving her of the right to engage in social and political activities, including with the use of mass media and telecommunication networks, for a period of 2 years.”¹⁹⁵ Utepova was also sentenced to 100 hours of “forced labor.”¹⁹⁶

According to the verdict, “being aware of the court decisions on recognizing ‘DCK’ and ‘Koshe Partyasy’ as extremist organizations, [Utepova] actively participated in the activities of ‘DCK’ and ‘Koshe Partyasy’ in the city of Nur-Sultan.”¹⁹⁷ The verdict finds that the decision banning Koshe came into effect on June 23, 2020, thereby excluding acts in the indictment that came before that date (such as the knitting of headdresses)¹⁹⁸ and limiting the conviction to the post regarding the rally; the post “What if I say that I support the DCK, would anyone be surprised?”; the post “There is an antivirus. And it’s called DCK”; and the post “Lessons of courage and bravery from Ablyazov.”¹⁹⁹ The verdict, however, also mentions Utepova’s New Years Eve toast.²⁰⁰

¹⁹⁰ Id.

¹⁹¹ Id.

¹⁹² Id.

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Monitor’s Notes, April 29, 2021.

¹⁹⁶ Id.

¹⁹⁷ Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021.

¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ Id.

Apart from the posts themselves, the court relies on the testimony of the political science experts Gabdullina and Kozhbanhan and expert opinion No. 2378, the conclusions of which the verdict repeats in full.²⁰¹ The verdict further deems “untenable” Utepova’s testimony that she had made posts regarding DCK and Koshe as part of a journalistic investigation, stating that Utepova “has no special education for engaging in journalistic activities.”²⁰² In June 2021, an appeals court rejected Utepova’s appeal against her conviction. Like others convicted of violating Article 405, Utepova has been placed on a list of those connected with the financing of terrorism and the authorities have blocked access to her bank account for an indefinite period.

²⁰¹ Id.

²⁰² Id.

METHODOLOGY



A. THE MONITORING PHASE

The Clooney Foundation for Justice’s TrialWatch Initiative deployed a monitor to observe the trial of Aigul Utepova before the Saryarka District Court of Nur-Sultan. The trial was held over Zoom. The monitor was fluent in Russian and Kazakh and able to understand the proceedings. The monitor did not experience any impediments in logging onto the video feed and was present for the entirety of the trial, which started on March 15, 2021 and concluded with Utepova’s conviction on April 29, 2021 (hearings on March 15, 25, & 29 and April 5, 7, 13, 14, 24, 28, & 29).

B. THE ASSESSMENT PHASE

To evaluate the trial’s fairness and arrive at a grade, TrialWatch Expert Éva Szeli reviewed an unofficial translation of the indictment and trial judgment, and an analysis of the case and the political and legal context in Kazakhstan prepared by the TrialWatch initiative. Dr Szeli identified both substantive and procedural violations of international human rights law in Utepova’s pre-trial detention, trial, conviction, and sentencing. Utepova was detained arbitrarily and tried unfairly under legislation used to silence and punish freedom of expression.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR), ratified by Kazakhstan on January 24, 2006; jurisprudence and commentary from the United Nations Human Rights Committee, tasked with interpreting and monitoring implementation of the ICCPR; and commentary from UN Special Procedures. Notably, Article 4 of the Kazakh Constitution recognizes ratified international treaties as having primacy over domestic law.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Arbitrary Detention

Article 9(1) of the ICCPR stipulates: “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”

The United Nations Human Rights Committee has noted that with respect to detention, the concept of “arbitrariness” must be “interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”²⁰³ Not only should pretrial detention be the exception and as short as possible, but also detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”²⁰⁴ This means that pretrial detention is appropriate for only a limited number of purposes: namely, to prevent flight, interference with evidence, and the recurrence of crime.²⁰⁵

In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an “individualized determination” of the accused’s particular circumstances.²⁰⁶ “Vague and expansive [justifications] such as ‘public security’” fail to

²⁰³ Human Rights Committee, İsmet Özçelik et al v. Turkey, U.N. Doc. CCPR/C/125/D/2980/2017, September 23, 2019, para. 9.3.

²⁰⁴ Human Rights Committee, Cedeño v. Bolivarian Republic of Venezuela, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

²⁰⁵ Human Rights Committee, Mikhail Marinich v. Belarus, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4.

²⁰⁶ See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also Human Rights Committee, Cedeño v. Bolivarian Republic of Venezuela, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10; Human Rights Committee, Van Alphen v. the Netherlands, U.N. Doc. CCPR/C/39/D/305/1988, July 23, 1990, para. 5.8; Human Rights Committee, Mikhail Marinich v. Belarus, U.N. Doc. CCPR/C/99/D/1502/2006, July 16, 2010, para. 10.4; Human Rights Committee, Mukong v. Cameroon, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994, para. 9.8.

meet this standard.²⁰⁷ Reference to the severity of the charges is likewise insufficient. As stated by the Committee, “[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.”²⁰⁸

Courts must additionally examine whether non-custodial alternatives, such as bail and monitoring devices, “would render detention unnecessary in the particular case.”²⁰⁹ Notably, if exceptional circumstances exist that permit the imposition of pretrial detention, the accused is entitled to periodic review of whether detention is still necessary.²¹⁰ A judge “must order release” of an accused “[i]f there is no lawful basis for continuing the detention.”²¹¹

Detention at Police Station

Utepova was arrested and detained on September 17. The protocol issued by the investigator, authorizing detention for an initial period of 72 hours per Kazakh legislation, stated that it was necessary to detain Utepova because she “may escape the body of pre-trial investigation and the court” and “being at large, may interfere with the objective investigation of a criminal case.”²¹² This assessment lacked an “individualized determination” with respect to Utepova’s circumstances, instead relying on vague pronouncements of risk of escape or interference. Further, the investigator appears to have failed to consider alternatives to detention. As such, Utepova’s detention from September 17 to September 20 violated Article 9 of the ICCPR.

House Arrest

House arrest constitutes a deprivation of liberty for the purposes of Article 9.²¹³ Accordingly, the Committee has found a violation of Article 9(1) where the authorities have failed to provide adequate grounds for ordering house arrest²¹⁴ and a violation of Article 9(3), which entitles defendants to trial within a reasonable time or release from deprivation of liberty, where the period of house arrest has continued beyond that for which the authorities can provide sufficient justification.²¹⁵

²⁰⁷ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at para. 36.

²¹² Investigative Division of the Police Department of Nur-Sultan, Protocol of detention of the person suspected of committing a criminal offence, September 17, 2020.

²¹³ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 5. See also Human Rights Committee, *Gorji-Dinka v. Cameroon*, U.N. Doc. CCPR/C/83/D/1134/2002, March 17, 2005, para. 5.4.

²¹⁴ See Human Rights Committee, *Abbassi v. Algeria*, U.N. Doc. CCPR/C/89/D/1172/2003, March 28, 2007, para. 8.3.

²¹⁵ See *id.* at para. 8.4.

Correspondingly, in *Bilash v. Kazakhstan*, the UN Working Group on Arbitrary Detention ruled that the five-month house arrest of a human rights defender violated Article 9(3):

the court's order, and the repeated extension, were not based on an individualized determination that they were reasonable and necessary taking into account all the circumstances, for such purposes specified in law as to prevent flight, interference with evidence or the recurrence of crime, and ... there was no consideration of alternatives, such as bail, electronic bracelets or other conditions, which would render detention unnecessary in the particular case.²¹⁶

With respect to the present case, on September 19, 2020 an investigator issued a request that Utepova be placed under house arrest for two months – until November 17, 2020 – as a preventive measure.²¹⁷ As grounds for this request, the investigator stated: “Taking into account that the suspect Utepova A.D. is suspected of a committing a crime under Part 2 of Article 405 of the Criminal Code of the Republic of Kazakhstan, which envisages the punishment of up to two years in prison, a preventive measure in the form of house arrest can be chosen against her, since she has a permanent place of residence in the city of Nursultan.”²¹⁸

An investigating judge of the Specialized Inter-district Investigative Court of Nur-Sultan subsequently approved the request, basing its decision on “the severity [level] of suspicion and the presence of a permanent place of residence” and that Utepova was “suspected of a deliberate minor crime.”²¹⁹

Neither the investigator's request nor the court's order contains any justification that would permit the imposition of a deprivation of liberty: risk of flight, risk of further commission of crime, or risk of interference with the evidence. As noted above, the severity of the charges is not grounds for detention. Indeed, the court appears to have inverted the requirement that a deprivation of liberty be “necessary,” basing the selection of house arrest on the fact that Utepova was “suspected of a deliberate minor crime” and indicating that this was why house arrest, not pretrial detention was chosen. Further, as in *Bilash*, there was “no consideration of alternatives, such as bail, electronic bracelets or other conditions, which would render detention unnecessary in the particular case.”²²⁰ As such, Utepova's confinement to house arrest violated Article 9.

²¹⁶ UN Working Group on Arbitrary Detention, Opinion No. 43/20 Concerning Serikzhan Bilash (Kazakhstan), U.N. Doc. A/HRC/WGAD/2020/43, December 14, 2020, para. 64.

²¹⁷ Investigative Division of the Police Department of Nur-Sultan, Request for the Preventive Measure of House Arrest, September 19, 2020.

²¹⁸ *Id.*

²¹⁹ Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. 7195-20-00-2-3m/5060, September 20, 2020.

²²⁰ UN Working Group on Arbitrary Detention, Opinion No. 43/20 Concerning Serikzhan Bilash (Kazakhstan), U.N. Doc. A/HRC/WGAD/2020/43, December 14, 2020, para. 64.

As noted above, an accused's deprivation of liberty must be periodically evaluated by a court to ensure that it does not continue beyond the period for which there is justification. In Utepova's case, the prosecution requested extensions of house arrest as the pretrial investigation continued, all of which were approved by the investigating court without re-evaluating the measure's necessity. For instance, in its final order, the court justified house arrest by stating that the defense needed time to familiarize itself with case materials, absent explanation of why this would necessitate Utepova's continued deprivation of liberty. Notably, in a number of these decisions the court also stated that it had not "established any exceptional circumstances preventing the suspect from being under house arrest."²²¹ As with the initial decision, the court inverts the necessity standard, putting the burden on the defense to prove exceptional circumstances that would permit Utepova's release as opposed to requiring the prosecution to prove the absolute necessity of house arrest.

Ultimately, Utepova remained under house arrest through her conviction on April 29, 2021 – a total of seven and a half months. In light of the above, her confinement to house arrest violated Article 9 of the ICCPR.

Additionally, for reasons discussed further below, Article 405(2), the charge underpinning Utepova's house arrest, is vague in violation of international standards, rendering her detention not only arbitrary but unlawful.

Involuntary Hospitalization

Involuntary committal to a psychiatric clinic constitutes a deprivation of liberty for the purposes of Article 9 of the ICCPR.²²² In this case, both the laws under which Utepova's hospitalization was authorized and her hospitalization itself violated standards established by the UN Human Rights Committee with respect to committal, rendering her deprivation of liberty in a psychiatric clinic arbitrary.

Kazakh Legislation on Involuntary Committal

The laws governing psychiatric detention in Kazakhstan are overbroad and subject to arbitrary application.

Under Article 271 of the Kazakh Code of Criminal Procedure, a psychiatric examination is mandatory "if it is necessary" to the case where "there are doubts about the [accused's] sanity or ability to defend their rights and legitimate interests in the criminal process."

²²¹ See Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. No. 7195-21-00-3m/50, January 6, 2021.

²²² UN Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, 2014, para. 5.

Article 271 further stipulates that “[i]f the expert states the impossibility of giving a conclusion without a stationary forensic psychiatric examination and placement of the patient for stationary examination, then the stationary forensic psychiatric examination shall be assigned to the criminal case in the manner provided in Article 279 of this Code.” Article 279 thus provides for the placement of an accused in an institution *simply for examination*.

Article 9 of the ICCPR permits involuntary committal only where there is a risk of harm to the individual or others. According to the Committee:

The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law.²²³

Kazakh legislation, in permitting hospitalization purely for the purposes of observation and examination, contravenes the ICCPR.

Utepova’s Involuntary Committal

As noted above, involuntary committal is only appropriate where there is a threat of harm to the individual or others, if then:²²⁴ committal for the purposes of observation is unnecessary and disproportionate.

Utepova, however, was hospitalized purely for the purposes of observation to determine her mental state: the expert examination cited by the court to justify Utepova’s committal was inconclusive, stating that “that it [was] not possible to unequivocally answer the questions posed by the investigator” and that further observation was necessary.²²⁵

Notably, although the court that initially authorized Utepova’s committal did so as a security measure, the appellate court overturned this decision, explicitly stating that there was no basis to commit Utepova on the grounds of security and that her committal was

²²³ Id. at para. 19. See also UN Human Rights Committee, *Mukhortova v. Kazakhstan*, U.N. Doc. CCPR/C/127/D/2920/2016, December 10, 2019, para. 7.4.

²²⁴ Notably, the Convention on the Rights of Persons with Disabilities, as interpreted by the CRPD Committee, “does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived disability, even if deemed necessary for others’ safety or for health care.”

²²⁵ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 538, October 28, 2020.

necessary solely for observation and examination.²²⁶ In rescinding the order to detain Utepova under security measures, the court acknowledged that no dangerousness criterion was met – or even alleged. Again, psychiatric detention based on mental disability alone is prohibited under international human rights law. And in Utepova’s case, even the potential label of mental disability had no basis, as discussed below.

The above facts reflect a violation of Article 9 of the ICCPR.

Retaliation for Exercise of Rights

On the whole, the circumstances of Utepova’s initial detention, house arrest, and involuntary committal suggest that they were in retaliation for the exercise of protected rights, rendering all three instances of deprivation of liberty arbitrary.

The Human Rights Committee has made clear that “[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), [and] freedom of association (art. 22).”²²⁷ The UN Working Group on Arbitrary Detention likewise deems arbitrary detention resulting from “the legitimate exercise of human rights, such as arresting peaceful protesters for the mere exercise of their rights to freedom of opinion and expression, freedom of assembly and freedom of association.”²²⁸ The Working Group “applies a heightened standard of review in cases in which the freedom of expression and opinion is restricted or in which human rights defenders are involved.”²²⁹

In *Elshibayev v. Kazakhstan*, the Working Group found the detention of a human rights defender arbitrary where the authorities had seemingly acted in response to the defender’s organization of peaceful rallies and exercise of his right to freedom of expression, including open criticism of the then-President in a speech uploaded to YouTube.²³⁰

Utepova’s initial detention and ensuing house arrest were likewise based on the exercise of rights protected by the ICCPR: namely, non-violent political speech. The investigation

²²⁶ Judicial Collegium for Criminal Cases of the Court of Nur-Sultan, Ruling No. 1am-1184/2020, November 19, 2020.

²²⁷ UN Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, 2014, paras. 17, 53.

²²⁸ UN Working Group on Arbitrary Detention, Revised Fact Sheet No. 26, February 8, 2019, pg. 6. Available at <https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf>.

²²⁹ UN Working Group on Arbitrary Detention, Opinion No. 5/2021 Concerning Erzhan Elshibayev (Kazakhstan), U.N. Doc. A/HRC/WGAD/2021/5, para. 60. See also UN Working Group on Arbitrary Detention, Opinion No. 43/20 Concerning Serikzhan Bilash (Kazakhstan), U.N. Doc. A/HRC/WGAD/2020/43, December 14, 2020, para. 59.

²³⁰ UN Working Group on Arbitrary Detention, Opinion No. 5/2021 Concerning Erzhan Elshibayev (Kazakhstan), U.N. Doc. A/HRC/WGAD/2021/5, paras. 4, 5, 60.

protocol emphasized that she had “publicly disseminate[d] materials propagating the activities of ‘DCK’ from her personal web page.”²³¹ Subsequently, the investigator’s request to impose house arrest, approved by the court, stated:

Thus, by reposting materials, the content of which is aimed at *forming a protest mood in society and encouraging political disobedience*, Utepova A.D. spread the ideology of the banned movement ‘DCK’ and ‘Koshe Partyasy.’

The posting of such materials on her own Internet pages testifies to the sameness of the ideological positions of A.D. Utepova and the ideology of the banned extremist movements ‘DCK’ and ‘Koshe Partyasy.’ From the point of view of political science, *propaganda is one of the main means of political manipulation, which induces people to take certain actions or accept the required opinion* [emphasis added].²³²

Correspondingly, the acts underlying the Article 405 charge listed in the prosecutor’s indictment were instances in which Utepova published non-violent political commentary concerning Koshe and the DCK on social media and one situation in which she called for a protest, without any reference to or indication of violence. Given the lack of evidence of anything beyond routine political analysis and activism – what the authorities labeled as Utepova “forming a protest mood in society and encouraging political disobedience” – Utepova’s detention and house arrest were based on her exercise of the right to freedom of opinion and expression, right to peaceful assembly, and right to freedom of association (detailed analysis of the respective rights below). This rendered her detention and house arrest arbitrary, in violation of Article 9 of the ICCPR.

Utepova’s involuntary committal was similarly arbitrary. There was no evidence that Utepova ever had a mental illness, making it likely that the real purpose of her committal was to prevent her from exercising her rights and punish her for her political commentary.

At the time of Utepova’s committal, she was not undergoing any psychiatric treatment or registered at any psychiatric clinic.²³³ Indeed, one of the questions asked by the investigator to the expert examiners was: “Does Utepova A.D. suffer from any mental disorder, if so, which one?”²³⁴ This question demonstrates the lack of specific evidence that Utepova was suffering from mental illness.

²³¹ Investigative Division of the Police Department of Nur-Sultan, Protocol of detention of the person suspected of committing a criminal offence, September 17, 2020.

²³² Investigative Division of the Police Department of Nur-Sultan, Request to Impose House Arrest, September 19, 2020.

²³³ Defense Appeal on Appointment of Utepova for Psychiatric Examination.

²³⁴ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 538, October 28, 2020.

The first expert examination found no proof of mental illness, stating that further observation was required.²³⁵ Subsequently, the examination conducted while Utepova was committed to the psychiatric institute concluded that Utepova was “mentally healthy” and “does not suffer from any mental disorder.”²³⁶

In addition to the dearth of proof of mental illness, the proceedings entailed other irregularities.

First, the nature and duration of a commitment must be reasonably related to its purpose. In this case, a month-long involuntary hospitalization was unnecessary to complete an examination that appeared to take place over a single day.

Second, the questions asked by the investigators to the experts conducting both the October 28 examination and the December 7 examination displayed a lack of understanding of the framework for assessing the mental state of an accused person, conflating various objectives for such an assessment, twisting procedures aimed at protecting an accused to Utepova’s detriment, and thus exposing the patently unjustified basis for Utepova’s ultimate committal.

Several questions, for example, concerned Utepova’s mental health generally speaking, such as the aforementioned question “Does Utepova A.D. suffer from any mental disorder, if so, which one?” and “What is the level of intellectual volitional mental development or socio-psychological traits of the suspect Utepova A.D.?”²³⁷ These questions were broad and exploratory since there was no prior evidence of mental illness. Other questions concerned Utepova’s mental state at the time of the alleged offense, such as “Was Utepova A.D. in a state of physiological affect while committing the crime?” and “[t]aking into account the individual psychological characteristics of the person examined, Utepova A.D., and the content of the investigated situation, was she able to realize the nature and meaning of her actions?”²³⁸

These questions serve no role at the investigative stage. A plea of insanity is an affirmative defense and, as such, may only be raised by the defense at the time of trial. Posing the questions about Utepova’s mental status at the time of the “crime” highlights a pretextual approach that presumes guilt prior to a fair trial with due process protections.

Another set of questions concerned Utepova’s mental state as related to the investigation and trial, such as “[i]s it possible to carry out investigative activities with Utepova A.D.?”²³⁹

²³⁵ Id.

²³⁶ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 735, December 7, 2020.

²³⁷ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 538, October 28, 2020; Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 735, December 7, 2020.

²³⁸ Id.

²³⁹ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 538, October 28, 2020.

and is “she capable of giving testimony about [the alleged offenses]?”²⁴⁰ The cornerstone principles of competency to stand trial are fairness and integrity. It is not fair to try an incompetent defendant – and doing so endangers the integrity of the judiciary and the broader legal system. As such, it is in the interest of all parties – the prosecution, the defense, and the presiding judge – that the defendant be capable of understanding the legal proceedings and participating meaningfully in his or her defense. In this case, however, the question was raised as a pretext to detain and discredit Utepova, not to establish her competency to proceed. This pretext is particularly evident insofar as the purported goal of the examination was to evaluate Utepova on her competency to proceed, yet only one question (or portion of a question) focused on elements of such competency.

Meanwhile, the question about whether Utepova had a tendency to lie,²⁴¹ asked in the October 28 examination, clearly exceeded the boundaries of psychiatric inquiry and was inappropriate on clinical and legal grounds.

With respect to other irregularities, as mentioned above, the initial court decision ordering Utepova’s involuntary committal did so as a preventive security measure,²⁴² meaning that Utepova was treated as a “dangerous criminal” in the psychiatric hospital, including being watched by a guard. As noted in the subsequent appellate decision, there was no basis for this measure and it did not correspond to the investigator’s original request.²⁴³

Such irregularities, in conjunction with the lack of evidence of mental illness and documented patterns of punitive psychiatry in Kazakhstan, indicate that Utepova’s hospitalization was in retaliation for her social media posts, qualifying it as arbitrary under Article 9. The investigative and judicial procedures resulting in her committal were pretextual from beginning to end, aimed not at protecting a Kazakh citizen or maintaining the integrity of the Kazakh legal system, but at achieving a desired end: suppressing dissent.

Right to Privacy

In Utepova’s case, the Kazakh authorities undertook covert surveillance measures that did not comply with the ICCPR. Article 17(1) of the ICCPR provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or

²⁴⁰ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 735, December 7, 2020.

²⁴¹ Institute of Forensic Expertise in Nur-Sultan, Expert Conclusion No. 538, October 28, 2020.

²⁴² Specialized Inter-district Investigative Court of Nur-Sultan, Resolution No. 7195-20-00-2-3m/6128, November 11, 2020.

²⁴³ Judicial Collegium for Criminal Cases of the Court of Nur-Sultan, Ruling No. 1am-1184/2020, November 19, 2020.

correspondence.” Any interference with this right must be: i) in accordance with a law²⁴⁴ that is “sufficiently accessible, clear and precise”;²⁴⁵ and ii) necessary for, and proportionate to, a legitimate aim.²⁴⁶

Extensive European Court of Human Rights jurisprudence on covert surveillance is instructive. Article 8 of the European Convention, like Article 17 of the ICCPR, protects the right to privacy, which the European Court has interpreted to impose similar limits.²⁴⁷

In applying these standards, the Court has held that surveillance may only be authorized where there are “factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures.”²⁴⁸ Additionally, the authorities must consider whether surveillance is necessary and whether they would be able to achieve their aims with less restrictive measures: i.e., without secret surveillance.²⁴⁹

In its 2017 *Dudchenko v. Russia* judgment, the European Court examined the court-authorized interception of a suspect’s telephone calls during a criminal investigation in Russia. The Court found that in authorizing telephone interception for 180 days the Russian court had failed both to undertake the requisite “necessity” and “proportionality” assessment before authorizing the surveillance and had not demonstrated the infeasibility of alternatives to surveillance beyond a “vague and unsubstantiated” statement that it “seem[ed] impossible to obtain the information necessary to expose [the applicant’s] unlawful activities by covert investigation.”²⁵⁰ According to the Court, that kind of explanation was not “sufficient” in light of the seriousness of the interference with the suspect’s right to privacy.²⁵¹ This, in combination with the fact that the court had failed to ascertain that “reasonable suspicion” existed for criminal charges, gave rise to an Article 8 violation, according to the European Court.²⁵²

²⁴⁴ See Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), April 8, 1988, para. 3.

²⁴⁵ See United Nations High Commissioner for Human Rights, “Report: The right to privacy in the digital age”, U.N. Doc. A/HRC/27/37, June 30, 2014, para. 23.

²⁴⁶ *Id.* See also Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), April 8, 1988, paras. 4, 7–8.

²⁴⁷ This right may only be interfered with when such interference is i) prescribed by law; and ii) necessary in a democratic society to pursue a legitimate aim found in the Convention, meaning that the measure pursues a “pressing social need” and the measure is proportionate to the legitimate aim to be achieved. See European Court of Human Rights, *Dudgeon v. the United Kingdom*, App. No. 7525/76, October 22, 1981, paras. 51–53. See also European Court of Human Rights, *Roman Zakharov v. Russia*, App. No. 47143/06, December 4, 2015, para. 227.

²⁴⁸ See European Court of Human Rights, *Zakharov v. Russia*, App. No. 47143/06, December 4, 2015, para. 260.

²⁴⁹ *Id.*

²⁵⁰ European Court of Human Rights, *Dudchenko v. Russia*, App. No. 37717/05, November 7, 2017, para. 98.

²⁵¹ *Id.*

²⁵² *Id.* at paras. 99–100.

In the present case, on September 16, 2020, the Inter-district Investigative Court of Nur-Sultan authorized the use of covert audio and/or video surveillance to be conducted at Utepova's home for one month. This decision was based on the monitoring of Utepova's Facebook page, which the order described as containing "destructive materials against the authorities of the Republic of Kazakhstan partially outlining calls for an illegal rally" and thus "had corpus delicti under Art. 405 of the Criminal Code of the Republic of Kazakhstan."²⁵³ A second court order authorizing covert audio and/or video surveillance, identical to the previous order, was issued on September 18, 2020.²⁵⁴

Beyond stating that Utepova was a suspect under Article 405, the orders contain no assessment of whether the surveillance was necessary and proportional and likewise do not appear to consider the feasibility of alternatives to invasive audio and video surveillance of Utepova's residence. Indeed, the orders are merely a copy of the investigator's request with a notation at the top confirming approval by the investigating judge, meaning that there is no original analysis at all. In light of the court's evident failure to evaluate the necessity and proportionality of this surveillance, it violated Article 17 of the ICCPR.

Notably, at the hearing on April 24, 2021, the prosecution introduced audio recordings of conversations between Utepova and others "about events in the Republic of Kazakhstan and the relationship between" various opposition leaders and activists, which appeared to have been obtained from covert surveillance operations.²⁵⁵

C. VIOLATIONS AT TRIAL

Right to Call and Examine Witnesses

International Standards

The principle of equality of arms protected by Article 14(1) of the ICCPR requires "that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."²⁵⁶ The UN Human Rights Committee has found violations of Article 14(1) where courts have inexplicably denied requests to summon witnesses.²⁵⁷ As an application of the equality of arms principle, Article 14(3)(e) of the ICCPR enshrines the

²⁵³ Inter-District Investigative Court of Nur-Sultan, Court Resolution on conducting covert audio and (or) video surveillance of a person or place (NSD-1), September 16, 2020.

²⁵⁴ Inter-District Investigative Court of Nur-Sultan, Court Resolution on conducting a covert penetration and/or site examination (NSD-6), September 18, 2020.

²⁵⁵ Monitor's Notes, April 14, 2021.

²⁵⁶ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 13.

²⁵⁷ See Human Rights Committee, *Evrezov et al. v. Belarus*, U.N. Doc. CCPR/C/112/D/1999/2010, November 25, 2014, para. 8.9; Human Rights Committee, *Khomidova v. Tajikistan*, U.N. Doc. CCPR/C/81/D/1117/2002, July 29, 2004, para. 6.5.

right of defendants in criminal cases “to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them].” In the words of the UN Human Rights Committee, this provision “is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”²⁵⁸ Article 14(3)(e) does not establish an absolute right to call and examine witnesses but a right to call witnesses who are relevant,²⁵⁹ if proposed in a timely manner in compliance with procedural requirements.²⁶⁰

In *Allaberdiev v. Uzbekistan*, the Committee considered a case in which the accused was charged with and convicted of drug-related offenses.²⁶¹ Defense counsel requested to call, among others, individuals involved with the investigation and individuals whom the accused alleged had planted the drugs.²⁶² Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.²⁶³ The Committee found a breach of Article 14(3)(e).²⁶⁴ Similarly, in *Saidov v. Tajikistan*, the Committee found a violation of Article 14(3)(e) where the court, “stating that the witnesses requested were too close to the accused and were interested in the outcome,” prevented the accused from calling 11 witnesses.²⁶⁵ Notably, the right to call and examine witnesses encompasses experts²⁶⁶ as well as police officers involved in the investigation.²⁶⁷ With respect to police reports admitted as evidence, the defense has the right to challenge both the contents of the report and the credibility of those who prepared it.²⁶⁸

²⁵⁸ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

²⁵⁹ Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

²⁶⁰ Human Rights Committee, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, March 27, 2006, para. 6.5; Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

²⁶¹ Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, May 18, 2017, paras. 2.1–2.21.

²⁶² *Id.* at para. 3.5.

²⁶³ *Id.* at paras. 8.7–8.9.

²⁶⁴ *Id.* at paras. 8.8–8.9.

²⁶⁵ Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

²⁶⁶ See Human Rights Committee, *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 8.4.

²⁶⁷ See European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018, para. 98; European Court of Human Rights, *Ürek and Ürek v. Turkey*, App. No. 74845/12, July 30, 2019, para. 50.

²⁶⁸ European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, February 13, 2018.

In interpreting Article 14(3)(e), the Committee has found violations not only where courts have refused to call proposed defense witnesses without adequate justification,²⁶⁹ but also where courts have unjustifiably cut short defense cross-examination of prosecution witnesses,²⁷⁰ and where the prosecution has introduced out-of-court statements by key witnesses without making those witnesses available for cross-examination by the defense.²⁷¹ In this regard, an accused cannot generally be convicted on the basis of evidence that has not been open to challenge.²⁷²

Calling of Witnesses

In the present case, the court denied multiple defense requests to call relevant witnesses without adequate justification. At the conclusion of the hearing on April 13, for example, the defense requested that the court summon the psychological expert and philological expert who had respectively provided analyses of Utepova's posts for expert opinion no. 2378, as well as Ospanov, one of the lead investigators.²⁷³ The court rejected the petition, ruling: "the experts gave their conclusions, they were announced during the court session. This will lead to an unreasonable delay in the trial. For a call to the operative, please contact the Police Department."²⁷⁴

With respect to the experts, their testimony was highly relevant: indeed, expert opinion no. 2378 concluding that Utepova's posts qualified as participation in the activities of a banned organization – which, as discussed above, was in dispute – was the linchpin of the prosecution's case, making it vital that the defense be provided the opportunity to challenge the experts' methodology and credibility. As such, the court's refusal of the defense request was unjustified. In particular, the court's reasoning that the statements had already been read aloud in court directly contradicted the principle that the authors

²⁶⁹ See Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, March 21, 2017, para. 8.9; Human Rights Committee, *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, May 13, 2016, para. 9.9; Human Rights Committee, *Dugin v. Russian Federation*, U.N. Doc. CCPR/C/81/D/815/1998, July 5, 2004, para. 9.3; Human Rights Committee, *Khomidova v. Tajikistan*, U.N. Doc. CCPR/C/81/D/1117/2002, July 29, 2004, para. 6.5; Human Rights Committee, *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.7.

²⁷⁰ Human Rights Committee, *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para. 7.7. See also European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, paras. 172, 210-212 (finding a violation of the right to call and examine witnesses where the presiding judge strictly limited and struck questions relating to the credibility of a key witness).

²⁷¹ See Human Rights Committee, *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, May 13, 2016, para. 9.9; Human Rights Committee, *Rouse v. Philippines*, U.N. Doc. CCPR/C/84/D/1089/2002, July 25, 2005, para. 7.5; Human Rights Committee, *Dugin v. Russian Federation*, U.N. Doc. CCPR/C/81/D/815/1998, July 5, 2004, para. 9.3.

²⁷² See Human Rights Committee, *Moraël v. France*, U.N. Doc. CCPR/C/36/D/207/1986, July 28, 1989, para. 9.4. See also European Court of Human Rights, *Křmář and Others v. the Czech Republic*, App. No. 35376/97, June 3, 2000, paras. 38-40, 45.

²⁷³ Monitor's Notes, April 13, 2021.

²⁷⁴ *Id.*

of key statements introduced by the prosecution should be subject to cross-examination by the defense.

The additional justification that the questioning of the experts would cause delays was likewise baseless: the defense request was made at the fourth hearing, the trial had been ongoing for less than a month, and only two witnesses had been examined at that point. Given that the investigation itself lasted approximately six months and that Utepova had already been under house arrest for seven months, the court's reference to time limits should not have been dispositive of a reasonable request for witness testimony.

Similarly, the court's refusal to issue a summons for Ospanov was unjustified. As noted above, police officers involved in an investigation may be summoned as witnesses. In Utepova's case, investigator Ospanov had participated in operations related to the investigation and had helped prepare the initial investigative report regarding Utepova's alleged "extremist" social media posts. The defense indicated that it was planning to question Ospanov about why he had deemed Utepova's social media posts in violation of Article 405²⁷⁵ as well as about certain covert surveillance measures used to retrieve information from Utepova's phone and computer, which the defense alleged had been undertaken without a proper court order.²⁷⁶ This testimony would have been relevant to core defense arguments: that Utepova's commentary did not constitute participation in the activities of a banned organization and that, in any event, investigative actions were unlawful. The court's instruction, without explanation, that the defense should itself call the police department, qualified as a functional refusal to summon an important witness. As such, it violated Article 14(3)(e).

Witnesses' Refusal to Testify

The European Court has held that "the refusal by a prosecution witness to answer questions put by the defendant" may undermine "the essence of his right to challenge and question that witness."²⁷⁷ While in some cases there may be "good reason" for a refusal to answer questions, such as invocation of the privilege against self-incrimination or fears for safety,²⁷⁸ "an unmotivated refusal" obligates the court to "take all necessary measures to ensure observance of the principles of adversarial proceedings and equality of

²⁷⁵ *Id.*

²⁷⁶ Monitor's Notes, March 25, 2021. Notably, on March 29 the defense requested to call investigator Kalzhanov, who prepared the indictment submitted to the court and ordered the expert examination that resulted in opinion no. 2378. Again, Kalzhanov's testimony was relevant to the key question of whether Utepova's acts constituted participation in a banned organization, particularly given that he could have explained the reasoning behind and framing of certain questions asked of the experts, thereby providing important information that the defense could have used to test the credibility of the expert opinion. While on March 29 the court approved the request, Kalzhanov never appeared in court.

²⁷⁷ European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, para. 202.

²⁷⁸ See *id.* at para. 203; European Court of Human Rights, *Al Khawaja & Tahery v. United Kingdom*, App. Nos. 26766/05 & 22228/06, December 15, 2011, para. 120.

arms.”²⁷⁹ In the case of *Pichugin v. Russia*, for example, the Court considered a case where a prosecution witness under cross-examination refused to answer questions but provided “no reasons.”²⁸⁰ The presiding judge did not warn the witness about “criminal liability for refusing to testify” and did not “give any explanation as to why [the witness] could be exempted from his duty to answer questions,” merely stating that the witness was “entitled not to answer.”²⁸¹ The European Court, citing the “gratuitous permission given by the presiding judge to [the witness] not to answer certain questions of the defence,” found a violation of the right to call and examine witnesses.²⁸²

In the present case, the court allowed witnesses to refuse to either testify or to answer defense questions without reminding the witnesses of their obligation to testify, without warning the witnesses of their potential criminal liability, and without explaining why the witnesses were “entitled not to answer.”

First, at the hearing on April 5, 2021, investigator Maksatuly – who, among other things, had authorized Utepova’s 72-hour detention, had filed the petition for her house arrest, and had filed the petition for covert surveillance of her apartment – appeared online but refused to answer any of defense counsel’s questions without explanation.²⁸³ The court did not intervene. Second, also on April 5, the court announced that Saltanat Tolegenovna Barykbaeva, one of the psychiatrists who conducted the forensic examination relied upon to involuntarily commit Utepova to a psychiatric hospital, had refused to testify.²⁸⁴ No explanation was provided.

Third, on April 13, 2021, political science expert Gabdullina likewise refused to answer questions posed by the defense. Gabdullina had provided an opinion in the initial stages of the investigation, finding, among other things, that “[t]he content of the submitted materials contains statements and calls for social unrest, for a change in the political regime in the country, which undermine social harmony and political stability, thereby aggravating the socio-political situation.”²⁸⁵

In response to defense questions about how she conducted her analysis and what materials she relied on, Gabdullina stated she was unable to answer as she had “g[iven] back to the investigation the materials, which were in hard copy, so [she] [could] not say

²⁷⁹ European Court of Human Rights, *Pichugin v. Russia*, App. No. 41596/13, October 23, 2012, para. 204. See also European Court of Human Rights, *Breijer v. the Netherlands*, App. No. 38623/03, July 3, 2018, paras. 32-33.

²⁸⁰ European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, October 23, 2012, paras. 201, 203.

²⁸¹ *Id.* at paras. 201, 204.

²⁸² *Id.* at para. 205.

²⁸³ Monitor’s Notes, April 5, 2021.

²⁸⁴ *Id.*

²⁸⁵ Conclusion of a Political Scientist, September 18, 2020.

anything.”²⁸⁶ When asked further about the methodology, Gabdullina said: “I will not tell you anything, since I have no materials on hand which I returned to the police.”²⁸⁷ Defense counsel requested re-examination of the witness at a later time so that she could properly prepare. The court not only denied this request, depriving the defense of the ability to conduct an effective cross-examination, but, as with investigator Makatsuly and expert Barykbaeva, never required Gabdullina to answer defense questions and never explained why she was entitled to decline to respond.²⁸⁸

The above reflects the court’s abdication of its responsibility to “take all necessary measures to ensure observance of the principles of adversarial proceedings and equality of arms”²⁸⁹ in response to an “unmotivated refusal” to answer questions, violating Article 14(3)(e).

Right to Equality of Arms (Use of Government Experts)

As noted above, the principle of the equality of arms, as guaranteed by Article 14(1) of the ICCPR, requires “that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”²⁹⁰ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has raised concerns about:

[The Kazakh authorities’] overreliance on ‘judicial experts’, notably those dealing with theology, philology and politics, in both pretrial and trial phases of extremism and terrorism procedures. Criminal charges of extremism are often brought solely on the basis of the opinions of experts whose requisite qualifications, independence and neutrality has not been established. ... In the view of the Special Rapporteur, the weight given to evidence analysis per se violates the principle of equality of arms and has profound implications on fair trials.²⁹¹

The case against Utepova is exemplary of this “overreliance.” Apart from Utepova’s social media posts, the indictment relies solely on expert opinion no. 2378, quoting its

²⁸⁶ Monitor’s Notes, April 13, 2021.

²⁸⁷ Id.

²⁸⁸ Id.

²⁸⁹ European Court of Human Rights, *Pichugin v. Russia*, App. No. 41596/13, October 23, 2012, para. 204. See also European Court of Human Rights, *Breijer v. the Netherlands*, App. No. 38623/03, July 3, 2018, paras. 32-33.

²⁹⁰ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 13.

²⁹¹ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/43/46/Add.1, January 22, 2020, para. 39.

conclusions in full.²⁹² The judgment follows suit, basing the conviction almost exclusively on the testimony of experts Kozhbanhan and Gabdullina as well as expert opinion no. 2378, which is heavily cited.²⁹³

As discussed above, defense counsel posed multiple questions about Gabdullina's methodology, noting that her two-page opinion contained no analysis or explanation of sourcing.²⁹⁴ Gabdullina refused to answer questions about the materials on which she based her analysis, at one point stating that her opinion was an "initial review" and not a conclusion or opinion. Nonetheless, the judgment cites Gabdullina's testimony in support of conviction —²⁹⁵ again, the only substantive evidence apart from expert opinion no. 2378 and Kozhbanhan's testimony.

Notably, Kozhbanhan was just a third-year doctoral student in political science²⁹⁶ and Gabdullina, who provided an opinion as a political science expert, had a degree in history. Further, the defense was denied the opportunity to cross-examine the two experts apart from Kozhbanhan who had contributed to expert opinion no. 2378.

The court's unquestioning reliance on the state experts' findings, particularly given significant questions about their substance and the experts' qualifications as well as the fact that certain experts were not subjected to cross-examination, undermined the equality of arms principle.

Right to Be Tried by an Impartial Tribunal

The conduct of the proceedings raises serious concerns about the impartiality of the tribunal.

Article 14(1) of the ICCPR guarantees to everyone "a fair and public hearing by a competent, independent and impartial tribunal established by law." Impartiality has two aspects: "First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."²⁹⁷

The United Nations Human Rights Committee has held that unreasonable decision-making can violate Article 14(1). In *Khostikoev v. Tajikistan*, the Committee found an

²⁹² Deputy Prosecutor of Nur-Sultan, Indictment, February 16, 2021.

²⁹³ Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021.

²⁹⁴ Monitor's Notes, April 13, 2021.

²⁹⁵ Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021.

²⁹⁶ Monitor's Notes, April 7, 2021.

²⁹⁷ Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21 [internal citations omitted].

Article 14(1) violation due to rulings that hindered the preparation of an effective defense, such as “ignor[ing] [counsel’s] objections” and “refus[al] to allow the possibility for the author to adduce relevant evidence.”²⁹⁸ Similarly, in *Toshev v. Tajikistan*, the Committee concluded that the court lacked impartiality where “several of the lawyers’ requests were not given due consideration.”²⁹⁹

Several features of the trial against Utepova indicate that the tribunal lacked impartiality.

First, the court’s repeated denial of defense requests to call key, relevant witnesses, including the experts whose findings formed the basis of opinion no. 2378, unreasonably disfavored the defense. Second, the court’s refusal to take action in response to witnesses who refused to answer questions or testify likewise put the defense at an unfair disadvantage.

Third, the court fell short of its obligation to proactively ensure the fairness of the proceedings. As discussed above, although the indictment enumerated eight acts by which Utepova had allegedly violated Article 405(2), stretching back into 2019,³⁰⁰ the court ruled that the decision on Koshe came into effect on June 23, 2020, and stated that it would only consider four acts that occurred thereafter.³⁰¹ Nonetheless, expert opinion no. 2378, which underpinned the convicting verdict, was based on all of the acts listed in the indictment, including those that the court had deemed irrelevant.³⁰² The court took no counterbalancing action to ensure appropriate limits on the use of an expert opinion that was based on acts that could not have been illegal by the court’s own logic. The court could, for example, have requested a different expert opinion confined to analysis of acts committed after June 23, 2020, or could have explained that the probative value of the opinion was limited in certain ways. Instead, the court simply relied on the opinion, and itself cited Utepova’s New Year’s toast to Ablyazov from 2019 without explaining its relevance and despite the fact that it occurred prior to Koshe being banned.³⁰³

Fourth, the court’s opinion, despite the aforementioned concerns about the experts’ qualifications and findings as well as the defense’s inability to cross-examine certain experts, unequivocally accepts the expert opinion and expert testimony, indeed making it the basis of the conviction.

²⁹⁸ Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006, December 3, 2009, paras. 7.2–7.3.

²⁹⁹ Human Rights Committee, *Toshev v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006, April 28, 2011, para. 6.6.

³⁰⁰ Deputy Prosecutor of Nur-Sultan, Indictment, February 16, 2021.

³⁰¹ Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021.

³⁰² Expert Conclusion No. 2378, December 31, 2020.

³⁰³ Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021.

In sum, the court's unreasoned rulings against the defense, its refusal to take action to protect the fairness of the trial, and its over-reliance on problematic state expert opinions contravened the guarantee of impartiality enshrined in Article 14(1) of the ICCPR.

D. OTHER FAIRNESS CONCERNS

Principle of Legality

Utepova's prosecution and conviction violated the principle of legality. This principle – also referred to as *nullum crimen sine lege* – is enshrined in Article 15(1) of the ICCPR, which provides, in relevant part: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” The principle of legality is “an essential element of the rule of law” and “should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment.”³⁰⁴

As the European Court of Human Rights has explained, the principle of legality not only prohibits the retroactive “application of the criminal law to an accused's disadvantage,” it also “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty,” which it must do clearly and precisely.³⁰⁵ The law must further be accessible and foreseeable to enable individuals to regulate their conduct accordingly, and must “not confer unfettered discretion ... on those charged with its execution.”³⁰⁶ The rules of criminal liability may be clarified through judicial interpretation, but only to the extent “that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”³⁰⁷ It follows that “[t]his requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.”³⁰⁸

The wording of Article 405(2), under which Utepova was charged, prosecuted, and convicted, is insufficiently precise, making it difficult for an individual to understand “what

³⁰⁴ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, May 17, 2010, para. 113. See also European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para. 52.

³⁰⁵ *Id.*

³⁰⁶ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25. Although the Committee in this Comment is discussing the principle of legality in the context of restrictions on the right to freedom of expression, these requirements are fundamental to the legality principle in any context.

³⁰⁷ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, May 17, 2010, para. 114. See also European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para. 52.

³⁰⁸ *Id.*

acts and omissions will make him criminally liable” and “confer[ring] unfettered discretion ... on those charged with its execution.”

Under Article 405(2), it is criminal to “participat[e]” in the “activities” of a banned organization “in connection with extremism or terrorism.” There is, however, no definition of or limiting principles applied to the terms “participat[e]” and “activities,” leaving their meaning uncertain. Could mere expression of support constitute participation? What about simply wearing clothes featuring the name or symbol of the banned organization or liking a post in support of the organization on social media? Correspondingly, what is meant by “activities”? Must activities be events formally organized by the banned party or can they be spontaneous and/or informal gatherings? Is a discussion on social media about the banned organization an “activity” in which one could “participat[e]” for the purposes of Article 405? The ambiguities in this regard make the provision susceptible to “overly broad or arbitrary interpretation or application.”

Further, the meaning of “extremism” is itself unclear. Kazakhstan passed the Anti-Extremism law on February 18, 2005. The law defines extremism in relevant part as:

[A]ctions by an individual and (or) legal entity ... following extremist goals ... : violent change of the constitutional order, violation of the sovereignty of the Republic of Kazakhstan, integrity, inviolability and inalienability of its territory, undermining the national security and defense of the state, violent seizure of power or forcible retention of power, creation, leadership and participation in an illegal paramilitary formation, organization of an armed insurrection and participation in it , incitement of social, class hatred (political extremism) ...

A wide range of acts is covered by the term “extremism” – among other things, acts that potentially contravene Kazakhstan’s sovereignty or integrity; that undermine its security; and that incite hatred – and none of the terms therein is defined. This makes it difficult for an individual or organization to ensure that they steer clear of violating the Anti-Extremism law, another layer of vagueness underlying the aforementioned problems with Article 405(2).

Such vague and overbroad wording is particularly susceptible to discriminatory enforcement in service of criminalizing political dissent and other protected free speech. As noted above, various UN bodies have raised concerns about the “the broad formulation of the concepts of ‘extremism’ ... under the [Kazakhstan’s] criminal legislation

and the use of such legislation on extremism to unduly restrict freedoms of religion, expression, assembly and association.”³⁰⁹

The ambiguities in Article 405(2) – and the ease with which they can be exploited – were demonstrated by Utepova’s case.

The indictment, for example, lists Facebook posts stating “There is an antivirus. And it’s called DCK” and “What if I say that I support DCK, would anyone be surprised?”, meaning that the prosecution understood “participation” under Article 405(2) to encompass the expression of views supportive of a banned organization on social media. That social media posts would be construed as “participation” – even without any showing of coordination with the organization in question – could not “reasonably be foreseen.” Given that Utepova’s prosecution and conviction was largely based on such postings, the proceedings violated the principle of legality.

Freedom of Expression

Utepova’s prosecution and conviction violated her right to freedom of expression. Under Article 19 of the ICCPR, “[e]veryone shall have the right to freedom of expression,” which encompasses “political discourse, commentary on one’s own and on public affairs, ... discussion of human rights, [and] journalism.”³¹⁰

In interpreting Article 19 of the ICCPR, the UN Human Rights Committee has emphasized the importance of safeguarding political debate and the ability to criticize public officials. The Committee, for example, has stated that “[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.”³¹¹ In the Committee’s words: “all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.”³¹² The Committee has further ruled: “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.”³¹³

According to the Committee, any restrictions on protected speech must (i) be provided by law, (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate

³⁰⁹ Human Rights Committee, Concluding Observations on the second periodic report of Kazakhstan, U.N. Doc. A/HRC/43/46/Add.1, August 9, 2016, para. 13.

³¹⁰ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

³¹¹ *Id.* at para. 13.

³¹² *Id.* at para. 38.

³¹³ *Id.* at para. 42.

to that objective.³¹⁴ Objectives deemed legitimate under Article 19(3) of the ICCPR include the protection of public morals, public health, public order, national security, and the rights and reputation of individuals.³¹⁵ As stated by the Committee, “[w]hen 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 ... in particular by establishing a direct and immediate connection between the expression and the threat.”³¹⁶

Where a restriction pursues a legitimate objective, it can still “violat[e] the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”³¹⁷ The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”³¹⁸ States must therefore meet a high threshold before instituting criminal prosecutions based on speech. Notably, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has asserted that under Article 19 only the gravest of speech offenses should ever be criminalized: child pornography, incitement to terrorism, direct and public incitement to commit genocide, and advocacy for national, racial, or religious hatred.³¹⁹

In accordance with the above standards, the proceedings against Utepova violated her right to freedom of expression.

The posts for which Utepova was convicted concerned political issues: the opposition parties DCK and Koshe.³²⁰ Specifically, the verdict finds Utepova guilty on the basis of the post “What if I say that I support the DCK, would anyone be surprised?”; the post “There is an antivirus. And it’s called DCK”; the post “Lessons of courage and bravery from Ablyazov”; and the post concerning the rally in front of the grocery store (addressed separately below in the freedom of peaceful assembly section).³²¹ The additional acts included in the indictment but not the verdict likewise relate to Koshe and DCK.

³¹⁴ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2. See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34.

³¹⁵ *Id.*

³¹⁶ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

³¹⁷ *Id.* at para. 33.

³¹⁸ *Id.* at para. 34.

³¹⁹ U.N. General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40. See also Human Rights Council, Report of the Special Rapporteur on the promotion and protection of fundamental freedoms and human rights while countering terrorism, U.N. Doc. A/HRC/31/65, April 29, 2016, para. 38; Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39, October 1, 1995, Principle 7.

³²⁰ Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021.

³²¹ *Id.*

Regardless of whether the posts were intended as support of DCK and Koshe, as journalistic inquiry, or as satire, Utepova's commentary was situated within a broader public dialogue on political issues. As established by the UN Human Rights Committee, this form of engagement with current events warrants heightened protection. Consequently, the limitation imposed – i.e., Utepova's criminal prosecution, conviction and sentencing – was unlawful unless it complied with the three-part test delineated by the UN Human Rights Committee.

It did not. First, as a threshold matter, the proceedings against Utepova failed to meet the requirement of legality. As discussed above, Article 405(2) is impermissibly vague, making it difficult for individuals to understand what acts are prohibited and affording the authorities excessive discretion.

Second, the imposition of any restrictions required articulation of a legitimate objective as well as demonstration "in specific and individualized fashion [of] the precise nature of the threat ... [and] a direct and immediate connection between the expression and the threat."³²² Even assuming that Utepova's prosecution was legitimately geared towards protecting public order, the authorities not only failed to present any "specific and individualized" information about the "precise nature of the threat" but also failed to establish "a direct and immediate connection between the expression and the threat."

The prosecution's case and the convicting judgment revolved around expert opinion no. 2378. The opinion, however, provides no concrete indicia of the likelihood of disruption of public order, instead making vague and conclusory statements, such as:

The content of the submitted materials contains statements and calls for social unrest, for a change in the political regime in the country, which undermine social harmony and political stability, thereby aggravating the socio-political situation.³²³

Beyond stating that the materials examined could engender a negative attitude towards the government – particularly amongst "a) those with a high cultural level, who fully realize the meaning of the statements, the inner conviction of which coincides with the information contained in the materials; b) the groups of people who do not have a sufficient degree of criticality, self-criticism, or are biased towards the information presented," – the opinion does not explain why or how this would lead to widespread public disorder as opposed to peaceful political criticism and opposition.³²⁴ Without identification of a concrete threat posed to society, the assessment falls short of Article 19 standards.

³²² Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

³²³ Expert Conclusion No. 2378, December 31, 2020.

³²⁴ *Id.*

Third, with respect to the necessity and proportionality requirements, the institution of criminal proceedings was not the “least intrusive instrument amongst those which might achieve their protective function.” As detailed above, the criminalization of speech is only appropriate where grave crimes have been committed, such as incitement to terrorism or advocacy of national, racial, or religious hatred. Although the indictment describes the main goals of DCK and Koshe as “to incite social hatred [and] the violent seizure of power and changes in the constitutional order of the Republic of Kazakhstan,” the prosecution did not allege and the court did not find that Utepova’s acts themselves qualified as incitement to violence or hatred.³²⁵ Indeed, the expert opinion specifically concludes that the materials examined did not evince a call to violent overthrow of the government – “the materials contain appeals and provocative statements and incentive language patterns calling for violation of public order, antisocial actions (illegal rallies, actions, etc.), which in turn would lead to an aggravation of the socio-political situation in the country, but do not contain appeals and provocative statements calling for a violent change of the constitutional order.”³²⁶

Fourth, the court’s conviction of Utepova entailed a two-year ban on political and civic activism, including through social media. This measure impermissibly restricted protected speech, which – as detailed above – includes political discourse. Even if the court had a legitimate interest in imposing a ban, it was neither necessary nor proportionate given the ban’s expansiveness in prohibiting Utepova from engaging in *any* political activism for two years, without exception. Utepova’s Article 19 right to freedom of expression was thus violated.

It is worth noting that the court’s verdict also exhibits a bias against informal journalism. The court rejects Utepova’s claims that many of her posts were for the purposes of journalistic inquiry, stating:

As established in the court session, Utepova A.D. graduated from the Faculty of Economics and the Faculty of Mathematics and Informatics, i.e. has no special education for engaging in journalistic activities. Officially, she is not listed in the staff of print media and in the media.³²⁷

The absence of a degree specializing in journalism or employment by a news outlet is not dispositive of whether an individual is engaging in journalism. The court’s assertion thus raises concerns about potential prejudice towards freelancing or reporting on social

³²⁵ See Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021; Deputy Prosecutor of Nur-Sultan, Indictment, February 16, 2021.

³²⁶ Expert Conclusion No. 2378, December 31, 2020.

³²⁷ Saryarka District Court of Nur-Sultan, Judgment, April 29, 2021.

media, both of which are key elements of the practice of journalism and both of which are protected by the right to freedom of expression.

Freedom of Peaceful Assembly

In addition to violating Utepova's right to freedom of expression, the proceedings violated her right to freedom of peaceful assembly.

The right to freedom of peaceful assembly is guaranteed under Article 21 of the ICCPR. The UN Human Rights Committee has explained that Article 21 "protects the non-violent gathering by persons for specific purposes, principally expressive ones. It constitutes an individual right that is exercised collectively. Inherent to the right is thus an associative element."³²⁸ Article 21 protection extends to organized and spontaneous assemblies alike, as well as to participants, organizers, and anyone disseminating information about or otherwise facilitating assemblies.³²⁹ "Given that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection."³³⁰ Indeed, authorities are required to enable peaceful protests, including by taking "specific measures" such as "block[ing] off streets [and] redirect[ing] traffic."³³¹

As is the case with respect to restrictions on the right to free expression, permissible restrictions on the right to freedom of peaceful assembly are strictly limited and must (i) be prescribed by law (the principle of legality), (ii) serve a legitimate objective, and (iii) be necessary to achieve and be proportionate to that objective.³³² With respect to the legitimacy of the objective, restrictions on the right to freedom of peaceful assembly are only permitted for the protection of national security or public safety, public order, public health or morals, or the rights and freedoms of others.³³³ "This is an exhaustive list."³³⁴ The UN Human Rights Committee has made clear that measures undertaken to protect public order should be narrowly tailored:

States parties should not rely on a vague definition of 'public order' to justify overbroad restrictions on the right of peaceful assembly. Peaceful assemblies can in some cases be

³²⁸ Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, July 23, 2020, para. 4.

³²⁹ Id. at paras. 13-14, 33-34.

³³⁰ Id. at para. 32.

³³¹ Id. at para. 24.

³³² ICCPR, Article 21. See also Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, July 23, 2020, para. 36.

³³³ ICCPR, Article 21.

³³⁴ Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, July 23, 2020, para. 41.

inherently or deliberately disruptive and require a significant degree of toleration. ‘Public order’ and ‘law and order’ are not synonyms, and the prohibition of ‘public disorder’ in domestic law should not be used unduly to restrict peaceful assemblies.³³⁵

Notably, “[i]f the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organizers or participants does not, on its own, place the participants outside the scope of the protection of article 21.”³³⁶

Utepova was prosecuted and convicted for the Facebook post “Dear friends! I call everyone to a rally tomorrow, August 7, at 10:00 a.m. Rally theme: ‘Shal ket, fuck you.’ Place for the rally: in front of the ‘Domashny’ store on Abai Avenue – the corner of Zhubanov Street, Nur-Sultan. The organizer of the meeting – ME.”³³⁷ “Shal ket” is a slogan that has commonly featured in protests against the government.³³⁸ Although the nature of the rally was unclear from the Facebook post, the use of the word “Shal ket” suggested that it might be political. As noted above, “assemblies with a political message should enjoy a heightened level of accommodation and protection.”³³⁹

In any event, there was no indication in the post that the rally might be violent or was intended to be violent. Moreover, even though the authorities had banned DCK and Koshe as extremist organizations and even if they assumed that Utepova’s assembly would be in support of one or both opposition parties, “[i]f the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organizers or participants does not, on its own, place the participants outside the scope of the protection of article 21.”³⁴⁰

In other words, the criminalization of DCK and Koshe and, by extension, related rallies, would not have removed such demonstrations from the scope of Article 21 protection “[i]f the conduct of participants” was peaceful. Given the lack of evidence to the contrary in Utepova’s post, her prosecution and conviction violated Article 21.

³³⁵ Id. at para. 44.

³³⁶ Id. at para. 16.

³³⁷ Deputy Prosecutor of Nur-Sultan, Indictment, February 16, 2021.

³³⁸ The New York Times, “Kazakhstan’s Former Leader Speaks Out on Unrest that Grippled the Country”, January 18, 2022. Available at <https://www.nytimes.com/2022/01/18/world/europe/kazakhstan-nursultan-nazarbayev-video.html>.

³³⁹ Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, July 23, 2020, para. 32.

³⁴⁰ Id. at para. 16.

Freedom of Association

Article 22 of the ICCPR protects the right to freedom of association. In interpreting Article 22, the UN Human Rights Committee has stated that “the existence and operation of associations, including those that peacefully promote ideas not necessarily favourably viewed by the Government or the majority of the population, is a cornerstone of any democratic society.”³⁴¹ The Committee has thus found that a government’s refusal to register a human rights organization, and the subsequent criminal conviction of the organization’s co-founder on related tax-evasion charges (for operating a bank account with dedicated funds for the organization despite the organization’s unregistered status), violated the founder’s right to freedom of association.³⁴²

As further noted by the European Court of Human Rights, that an organization’s “political programme [is] considered incompatible with the current principles and structures of the ... State does not make it incompatible with the rules and principles of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”³⁴³ Consequently, restrictions on associations based on their divergence from the agenda of the ruling party do not comply with the right to freedom of association.³⁴⁴

In the present case Utepova was prosecuted and convicted for allegedly participating in the activities of banned organizations – i.e., DCK and Koshe. As discussed above, there were serious doubts about whether the charged acts qualified as participation in the activities of DCK or Koshe. Leaving this aside, however, it is unclear that DCK or Koshe should have been classified as extremist organizations and thereby criminalized in the first place. While the decisions banning DCK and Koshe have not been made public, the European Parliament³⁴⁵ and U.S. State Department³⁴⁶ have characterized the parties as peaceful. As made clear by the Human Rights Committee, Article 22 of the ICCPR protects the freedom to associate with organizations or other entities that are “not necessarily favourably viewed by the Government or the majority of the population.” Assuming DCK and Koshe are indeed peaceful, as appears to be the case, and have

³⁴¹ See Human Rights Committee, *Pinchuk v. Belarus*, U.N. Doc. CCPR/C/112/D/2165/2012, November 17, 2014, para. 8.4.

³⁴² See *id.* at para 8.6.

³⁴³ European Court of Human Rights, *Case of the United Macedonian Organization Ilinden-Pirin and Others v. Bulgaria*, App. No. 59489/00, October 20, 2005, para. 61.

³⁴⁴ *Id.* at paras. 61–63.

³⁴⁵ European Parliament, *Resolution on the human rights situation in Kazakhstan*, 2021/2544(RSP), February 10, 2021, para. 5.

³⁴⁶ U.S. Department of State, “2020 Country Report on Human Rights Practices: Kazakhstan”, March 2021, pg. 40.

been prohibited in country merely for deviating from the Nur-Otan party's agenda, this would violate Article 22, as would Utepova's prosecution under Article 405(2).

CONCLUSION AND GRADE



As demonstrated by Aigul Utepova's unjustified forced committal to a psychiatric clinic, arbitrary house arrest, baseless conviction, and ensuing ban from public commentary, the authorities used criminal proceedings under Article 405(2) to intimidate and silence her.

Freedom of expression, freedom of peaceable assembly, and freedom of association are vital cornerstones of democracy, enshrined in international human rights documents by which Kazakhstan is bound. The exercise of these freedoms cannot be criminalized under broadly formulated definitions of extremism in domestic legislation, such as Article 405 of the Criminal Code. Kazakh anti-extremism laws must be reformed to narrow these definitions, to ensure that the parameters of these laws are clear and predictable, and to prevent their application in suppressing protected freedoms.

Correspondingly, international human rights law provides clearly articulated parameters for all forms of State-sanctioned detention. Domestic laws must reflect these protections. Kazakh laws on commitment to psychiatric institutions – whether civil or criminal – must be amended to provide comprehensive due process protections. Substantively, these laws must clearly outline the criteria for any loss of liberty, and these criteria must be reasonably related to the purpose for which the individual is committed. Procedurally, they must include notice, counsel, hearing, a heightened standard of proof, and periodic review. Such due process rights not only protect the individual, but also serve to ensure the integrity of the judiciary and the broader legal system.

Although Kazakhstan may assert itself as a democratic republic – and has ratified most major international human rights instruments – this case reveals that the Kazakh government and its State actors engage in violations of human rights law that harken back to the days of authoritarian Soviet regimes. Robust democracies do not suppress political dissent in their citizens by weaponizing laws intended to protect their civil and political rights. The protection of free speech is essential to the functioning of a democratic society, and the use of arbitrary detention and punishment to stifle dissent conflicts with Kazakhstan's stated commitment to democratic governance.

The impact of these unjust criminal proceedings on Aigul Utepova cannot be overstated. She has lost her freedom of movement because of restrictions imposed by the sentence; she has lost her career as a freelance journalist because of the court's ban on her public commentary about social issues; and she has lost access to her bank account due to being placed on a terrorism watchlist, throwing her into a state of uncertainty as to the future. One year on from her sentence, Kazakhstan must reverse her conviction and provide remedies to Utepova for the damage done.

GRADE:

D



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”³⁴⁷ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

³⁴⁷ ICCPR, Article 26.