



**Kazakhstan
v. Askhat
Zheksebaev et al.**

November 2022

Stephanie Farrior

TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHORS

Professor Stephanie Farior, a professor of international law and human rights for 30 years, is the past Director of the Legal and International Organizations Programme at Amnesty International's International Secretariat. She was previously a co-founder of the Center for Justice and Accountability as well as the Amnesty International-USA Legal Support Network, and served several terms on the Executive Council of the American Society of International Law (ASIL). Professor Farior has advised UN Special Rapporteurs and human rights treaty bodies, and served as an international law expert on Amnesty International missions to Pakistan, Malawi, Yemen, and India. A past Visiting Fellow of the University of Oxford, Professor Farior has published extensively on equality and non-discrimination under international law.

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 legal assessment and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



Professor Stephanie Farrow, member of the TrialWatch Experts Panel, assigned this trial a grade of “D”:

The criminal proceedings against Askhat Zheksabaev violated numerous international fair trial standards. Mr. Zheksabaev was denied the right to adequate time and facilities to prepare his defense, the right to examine witnesses against him, and the right to an independent and impartial tribunal. Moreover, the basis of the criminal charge was a vague and overbroad law that is incompatible with the rights to freedom of expression, peaceful assembly and association, and Mr. Zheksebaev’s prosecution for his peaceful political activity violated his right to political participation and to equality before the law without discrimination.

From July 27 to October 11, 2021, the Clooney Foundation for Justice’s TrialWatch initiative monitored the trial of activist Askhat Zheksebaev in Kazakhstan. Mr. Zheksebaev was prosecuted under Kazakhstan’s vague and draconian “anti-extremism” legislation for his peaceful involvement with an opposition movement, the Koshe Party, which was banned in a secret court decision that the authorities refused to release to the defense. Throughout the duration of the proceedings, neither the prosecution nor the court alleged that Mr. Zheksebaev had encouraged or even mentioned violence. In addition, the Koshe Party ban took effect only *after* most of the acts for which Mr. Zheksebaev was tried, meaning that these acts were not criminal at the time. Nonetheless, Mr. Zheksebaev was convicted and sentenced to jail in a trial marred by severe irregularities, which included the court barring the defense from questioning key prosecution witnesses. In sum, the outcome of the case appears to have been a foregone conclusion, with the proceedings but a vehicle to punish Mr. Zheksebaev for his activism.

Case History and Background

On March 13, 2018, the Yesil District Court in Astana banned the Democratic Choice of Kazakhstan political party (“DCK”) as an “extremist organization.” On May 19, 2020, the Yesil District Court followed up by banning a newly-formed movement, the Koshe Party, as extremist, and deeming it a successor of the DCK. This decision did not come into legal force until June 26, 2020. Neither the decision banning the DCK nor the decision banning the Koshe Party has been made public, and the European Parliament and U.S. State Department have characterized both parties as peaceful opposition movements. Under Article 405 of the Kazakh Criminal Code, however, participation in or organization of the activities of organizations banned by court decisions is criminal, carrying potential sentences of, respectively, up to two or six years in prison.

Mr. Zheksebaev is an activist who has repeatedly been arrested and detained for administrative offenses based on his participation in peaceful rallies, campaigns, and pickets. On August 22, 2020, he was detained on Article 405 charges; the prosecution alleged that from April–June 2020, Mr. Zheksebaev posted videos and messages in support of the Koshe Party on social media and communicated with other Koshe Party members over Telegram about Party activities, including rallies. Almost every act alleged in the indictment occurred before the court decision banning the Koshe Party went into legal effect.

Following his arrest, Mr. Zheksebaev spent nearly one year in pretrial detention. His trial started on July 27, 2021 and was held over Zoom video-conference due to the COVID-19 pandemic. Mr. Zheksebaev was tried alongside 12 co-defendants, who were also facing Article 405 charges.

Apart from the social media posts and Telegram messages themselves, the prosecution heavily relied on government ‘expert’ reports that concluded, among other things, that conversations between Mr. Zheksebaev and other Koshe Party members were “aimed at encouraging participation in ‘protests,’ [and] ‘rallies.’”

On October 11, 2021, Mr. Zheksebaev was convicted of “being the leader and organizer of the extremist organization ‘Koshe Party’” and sentenced to “imprisonment for a period of 5 (five) years with deprivation of the right to engage in social and political activities using the media and telecommunication networks for a period of 5 (five) years.”¹

More broadly, Mr. Zheksebaev’s case is one of many examples of the Kazakh authorities’ misuse of overbroad anti-extremism legislation to target peaceful political opposition. This report follows prior TrialWatch reporting on another case brought under Article 405 (against journalist Aigul Utepova), which evidenced similar flaws.

Fair Trial Violations

Mr. Zheksebaev’s trial was marred by violations of his fair trial rights under the International Covenant on Civil and Political Rights (ICCPR), to which Kazakhstan is party: primarily, his right to adequate facilities, his right to examine witnesses, and his right to judicial impartiality.

First, regarding the right to adequate facilities: the Yesil court decision banning the Koshe Party lay at the core of the charges against Mr. Zheksebaev. On the basis of this decision, the prosecution argued that Koshe was merely a continuation of the already banned DCK and that it thus did not matter that Mr. Zheksebaev’s alleged acts preceded the banning of Koshe.² Nonetheless, the court repeatedly refused defense requests to obtain access

¹ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

² Criminal Indictment (July 2, 2021).

to the ruling and offered no justification for withholding it. Pursuant to the right to adequate facilities, the defense must be allowed to put all relevant arguments before the trial court. Denying Mr. Zheksebaev access to the court decision that lay at the core of the charges against him impeded the defense's ability to prepare and argue its case, thereby violating the right to adequate facilities.

Second, regarding the right to call and examine witnesses, the court refused defense requests to question the government 'expert' witnesses whose conclusions formed a key part of the prosecution's case. According to the court, the availability of their written opinions sufficed. To the contrary, written work does not displace the right to examine witnesses at one's trial. The defense must have the opportunity to challenge the reliability of the evidence itself as well as the credibility and probity of witnesses. It was thereby essential that the defense be allowed to question the 'experts' about their methodology, experience, and findings. That their opinions were available in written form did not obviate the need for cross-examination.

Third, the proceedings violated Mr. Zheksebaev's right to be tried by an independent and impartial court. The court's unwarranted refusals to provide the decision banning the Koshe Party and to call prosecution witnesses for questioning were among many examples of its bias against the defense. In addition, the court reviewed 78 volumes of written evidence – with approximately 170 pages per volume – in just a few hours. This haste would objectively appear to be indicative of a predetermined outcome.

Also indicative of a predetermined outcome was the court's convicting judgment, which functionally disregards the fact that almost all of the specific acts for which Mr. Zheksebaev was convicted occurred before the decision banning the Koshe Party went into effect, meaning that they were not criminal at the time. The judgment skims over this problem, repeating the prosecution's contention that "all defendants were adherents of the ideas promoted by the DCK movement ... [and] in order to continue the illegal activities of 'DCK,' Mr. Zheksebaev [and other defendants] took measures to change its name and transform it into 'Koshe Party.'"³ The court does not address defense counsel's arguments that DCK and Koshe were substantively different parties and that, in any event, mounting a defense necessitated access to the decision banning Koshe, stating merely that the defense could have read the prosecution's press release about the decision. Strikingly, there is no analysis regarding the successor theory at all beyond the above conclusory statement.

In sum, the court's focus appears to have been on reaching a particular outcome (i.e., a finding of guilt), not on fairly and independently evaluating the facts.

³ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

Anti-Extremism Legislation

The proceedings also violated Mr. Zheksebaev's right to freedom of expression, peaceful assembly, and association.

Kazakhstan's anti-extremism legislation is overly vague, contrary to ICCPR requirements that any restrictions on these three rights be clearly and precisely articulated, so that individuals can regulate their conduct accordingly. Articles 405(1) and (2) criminalize, respectively, the "organization" of and "participation" in the "activities" of a banned extremist organization. It is unclear, however, what would constitute "organization" or "participation," and what would qualify as the "activities" of a banned organization. The lack of limiting criteria in Articles 405(1) and (2) gives the Kazakh authorities extensive discretion to target dissenting voices.

In turn, the acts for which Mr. Zheksebaev was prosecuted – exclusively peaceful social media posts and Telegram messages – are protected by the rights to freedom of expression, peaceful assembly, and association. Indeed, the judgment cites as proof of Mr. Zheksebaev's guilt a government 'expert' witness's opinion that his actions were:

[U]nited by a common theme and are aimed at informing about the activities of the "Koshe Party" movement, the purpose of which is to establish a Parliamentary Republic in the country, encouragement to join and unite in its ranks, an expression of dissatisfaction with the socio-political situation in the country, a negative assessment of the current government, law enforcement agencies, a call to take actions aimed at changing the government, as well as the resignation of the Government.⁴

The objectives of changing the government, exposing problems that reflect a "negative assessment" of the ruling party, and encouraging opposition can be found in the mission statements of many civil society organizations. The indictment and judgment do not cite any specific instance of Mr. Zheksebaev calling for violence or even any instance in which Mr. Zheksebaev's words or actions might be implicitly understood to be referring to violence. Given the lack of any allegations of activity beyond routine political activism, the proceedings against Mr. Zheksebaev appear to have been politically motivated and geared towards stifling his human rights work.

Conclusion

While Mr. Zheksebaev's sentence was suspended in April 2022 and he has since been released, the sentence still includes a five-year ban on public activism, meaning that Mr. Zheksebaev is no longer able to carry out his work or speak freely. Further, he is confined within the city limits of Almaty, must check in with the police every 15 days, and has had

⁴ *Id.*

his bank accounts frozen due to his placement on a list of so-called extremists convicted under Article 405. This hobbling of Mr. Zheksebaev sends a strong signal to other opposition voices in Kazakhstan and is just the latest page in Kazakhstan's playbook for silencing dissent. Mr. Zheksebaev's appeal in the first instance was rejected and he has now filed an appeal before the Supreme Court of Kazakhstan, which is expected to issue a decision in December. The Court must overturn Mr. Zheksebaev's unjust conviction and the authorities should revise Kazakhstan's overbroad extremism laws.

BACKGROUND INFORMATION

A. POLITICAL & LEGAL CONTEXT

The prosecution and conviction of Askhat Zheksebaev illustrates how Kazakhstan suppresses political dissent under the guise of preventing extremism.

Suppressing Dissent Under the Guise of Combating “Extremism” and Terrorism

Measures the government has taken to suppress opposition voices reportedly include the breaking up of peaceful protests, arrests, detention, torture, denial of access to lawyers, the banning of opposition movements, and criminal prosecutions. The government has often invoked laws combating extremism and terrorism to justify these measures.

A recent example took place just months ago. On January 2, 2022, after a peaceful protest over income inequality and fuel prices began in the oil-producing city of Zhanaozen (“January Protests”), Kazakh police detained protesters and, according to Human Rights Watch, tortured some of these detainees and interfered with their access to lawyers.⁵ Over the next weeks, the protests quickly spread across the country, including to the country’s largest city, Almaty, where “Kazakh security forces used excessive force ... including lethal force such as shooting at protesters and rioters who posed no immediate threat.”⁶ Approximately 227 people were killed⁷ and over 9,900 were detained.⁸ On January 5, the authorities shut down the internet nationwide,⁹ and the next day Russian-led forces arrived in Kazakhstan as part of a “peacekeeping” mission¹⁰ to help neutralize what Kazakh President Kassym-Jomart Tokayev had labeled a “terrorist threat.”¹¹ Several UN Special Rapporteurs condemned Kazakhstan’s “wholesale barriers

⁵ *Kazakhstan: Protestors Arbitrarily Arrested, Beaten*, HUMAN RIGHTS WATCH (Feb. 1, 2022), <https://www.hrw.org/news/2022/02/01/kazakhstan-protesters-arbitrarily-arrested-beaten#>.

⁶ *Kazakhstan: No Justice for January Protest Victims*, HUMAN RIGHTS WATCH (May 5, 2022), <https://www.hrw.org/news/2022/05/05/kazakhstan-no-justice-january-protest-victims>.

⁷ Ariel Cohen, *The Future of Western Energy Investments in Kazakhstan*, FORBES (Feb. 7, 2022), <https://www.forbes.com/sites/arielcohen/2022/02/07/the-future-of-western-energy-investments-in-kazakhstan/?sh=4d335f5054b4>.

⁸ *Kazakh President Announces CSTO Troop Withdrawal, Criticizes Predecessor*, RADIO FREE EUROPE (Jan. 11, 2022), <https://www.rferl.org/a/kazakhstan-detains-10000-unrest/31648618.html>.

⁹ On January 7, 2022, the internet was partly restored. See Nastassia Astrasheuskaya, *Voices from Kazakhstan: protesters unbowed despite bloody crackdown*, FIN. TIMES (Jan. 14, 2022), <https://www.ft.com/content/e22f928c-e2ab-4656-be77-25203773aa95>.

¹⁰ *Russian paratroopers arrived in Kazakhstan as unrest continues*, THE GUARDIAN (Jan. 6, 2022), <https://www.theguardian.com/world/2022/jan/06/shots-heard-in-kazakhstan-as-protests-enter-third-day>.

¹¹ Lance Davies, *Russia’s Response to Unrest in Kazakhstan: Risk Versus Reward*, RUSI (Jan. 10, 2022), <https://rusi.org/explore-our-research/publications/commentary/russias-response-unrest-kazakhstan-risk-versus-reward>.

to freedom of expression and assembly premised on terrorism [as] absolutely contrary to the strict provisions under international human rights law on the right to life.”¹²

Such suppression of dissent in the name of national security and public order is not new in Kazakhstan. The Criminal Code of the Republic of Kazakhstan (“Criminal Code”) includes several provisions that the government regularly uses to target opposition voices, including Article 174 (criminalizing the incitement of social, national, patrimonial, racial, class, or religious discord) and Article 378 (criminalizing the insult of a government representative).¹³ In 2016, for example, the Kazakh authorities charged Kuanysch Bashpayev with violating Article 174 after he criticized the state-run Spiritual Administration of Muslims.¹⁴ In April 2017, he was sentenced to four-and-a-half years in prison¹⁵ following a closed trial.¹⁶

Article 378 has likewise served as a tool to harass activists and critics. In May 2017, trade union leader Amin Yeleusinov¹⁷ and co-defendants were convicted under this provision, among others, in a trial that “appear[ed] to be motivated by the government’s discontent” with protests against the forced closure of the federal trade union body, the Confederation of Independent Trade Unions of Kazakhstan.¹⁸ Yeleusinov was sentenced to two years in prison and was banned from engaging in public activities for five years.¹⁹ His lawyer argued the proceedings were unfair, citing the judge’s denial of defense motions to “gain access to exculpatory” materials.²⁰ Yeleusinov was granted “parole” and released after nearly sixteen months in prison.²¹

¹² *Kazakhstan: UN experts condemn lethal force against protests, misuse of term ‘terrorists’*, OHCHR (Jan. 11, 2022),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28019&LangID=E>.

¹³ Criminal Code of the Republic of Kazakhstan [Kazakhstan Criminal Code], arts. 174, 378, <https://www.refworld.org/pdfid/5d541c884.pdf>.

¹⁴ *Kazakhstan: Article 174 Cases Increase, Cancer Sufferer Tortured*, FORUM 18 (Mar. 7, 2017), <https://www.refworld.org/docid/58bfbe4c4.html#:~:text=Fellow%20Jehovah's%20Witness%20Teymur%20Akhmedov,Criminal%20Code%20Article%20174%20cases>.

¹⁵ *Germany Rejects Extradition Request*, FORUM 18 (Mar. 1, 2019), <https://www.ecoi.net/en/document/1458509.html>.

¹⁶ *Kazakhstan: Article 174 Cases Increase, Cancer Sufferer Tortured*, FORUM 18 (Mar. 7, 2017), <https://www.refworld.org/docid/58bfbe4c4.html#:~:text=Fellow%20Jehovah's%20Witness%20Teymur%20Akhmedov,Criminal%20Code%20Article%20174%20cases>.

¹⁷ Note: Also spelled as Amin Eleusinov.

¹⁸ *Kazakhstan: Trade Union Leader Jailed*, HUMAN RIGHTS WATCH (May 17, 2017), <https://www.hrw.org/news/2017/05/17/kazakhstan-trade-union-leader-jailed>.

¹⁹ *Id.*; Igor Savchenko, *The list of Kazakhstani political prisoners and persons subjected to politically motivated prosecution by Kazakhstan*, OPEN DIALOGUE (Oct. 12, 2017), <https://en.odfoundation.eu/a/8423,the-list-of-kazakhstani-political-prisoners-and-persons-subjected-to-politically-motivated-prosecution-by-kazakhstan/>.

²⁰ *Kazakhstan: Trade Union Leader Jailed*, HUMAN RIGHTS WATCH (May 17, 2017), <https://www.hrw.org/news/2017/05/17/kazakhstan-trade-union-leader-jailed>.

²¹ *Trade Union Leaders Freed in Kazakhstan*, HUMAN RIGHTS WATCH (June 6, 2018), <https://www.hrw.org/news/2018/06/06/trade-union-leaders-freed-kazakhstan>.

Since 2018, Kazakhstan has increasingly harassed, detained, and criminally prosecuted members of alleged “extremist” groups under anti-extremism laws as another means of suppressing dissent.²² Kazakhstan passed a statute specifically aimed at countering extremism on February 18, 2005. The law defines extremism in relevant part as:

[A]ctions of individuals and (or) legal entities ... following extremist purposes ... : forcible change of the constitutional system, violation of the sovereignty of the Republic of Kazakhstan, integrity, inviolability and inalienability of its territory, disruption of national security and defense capacity of the state, forcible seizure of power or forcible retention of power, creation, management and participation in the illegal paramilitary forces, organization of armed rebellion and participation in it, incitement of social, estate strife (political extremism)...²³

Under the auspices of preventing such “extremism,” the Criminal Code establishes several offenses, including: creating and participating in an extremist group, financing extremist organizations or activities, and enlisting individuals for participation in an extremist activity.²⁴

Article 405 of the Criminal Code, in particular, provides in full that:

1. The organization of activities of a public or religious association or other organization, concerning which there is an enforceable court decision to ban their activities or liquidate them in connection with the implementation of extremism or terrorism, –

shall be punishable by a fine of up to six thousand monthly calculation indices, or correctional labor for the term of up to six years, or imprisonment for the same term, with or without deprivation of the right to hold certain positions or engage in certain activities for up to five years, with deportation of a foreigner or stateless person from the Republic of Kazakhstan for a period of five years.

2. Participation in the activities of a public or religious association or other organization, concerning which there is an enforceable court decision to ban their activities or liquidate them in connection with the implementation of extremism or terrorism, –

shall be punishable by a fine of up to two thousand monthly calculation indices, or correctional labor for the term of up to two years, or imprisonment

²² *HRW Slams Kazakhstan for Clampdown against Government Critics*, EMERGING EUR. (July 7, 2021), <https://emerging-europe.com/news/hrw-slams-kazakhstan-for-clampdown-against-government-critics/>.

²³ Law on Countering Extremism, art. 1, https://adilet.zan.kz/eng/docs/Z050000031_.

²⁴ Kazakhstan Criminal Code, arts. 182, 258–60, 405, <https://adilet.zan.kz/eng/docs/K1400000226>.

for the same term, with or without deprivation of the right to hold certain positions or engage in certain activities for up to three years, with deportation of a foreigner or stateless person from the Republic of Kazakhstan for a period of five years.²⁵

Conviction under either subsection automatically adds an individual to a list of those “connected with the financing of terrorism or extremism” maintained by the Financial Monitoring Agency, resulting in strict limitations on an individual’s finances.²⁶

The government has leveraged the vague formulation of the 2005 anti-extremism legislation and corresponding articles in the Criminal Code – such as Article 405 – to suppress opposition voices.²⁷ In April 2017, the political opposition leader Mukhtar Ablyazov – who lives in exile and co-founded the Democratic Choice of Kazakhstan (“DCK”) in 2001 – announced the party’s re-establishment.²⁸ That year, Kazakhstan initiated “528 criminal investigations into terrorist propaganda, extremism, and incitement to hatred” and, as described by *Open Democracy*, detained “civic activists, bloggers and human rights activists whose opposition simply had to be neutralized.”²⁹

On March 13, 2018, the Yesil District Court of Astana banned the DCK as an “extremist” party in an unpublished court decision.³⁰ As a result, the DCK was prohibited from participating in elections³¹ and any future involvement with the organization was criminalized under Article 405 of the Criminal Code.³²

²⁵ *Id.*, art. 405.

²⁶ *Id.*; *Kazakhstan: Crackdown on Government Critics*, HUMAN RIGHTS WATCH (July 7, 2021), <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics>; *List of organizations and persons involved in the financing of terrorism and extremism*, FIN. MONITORING AGENCY (Sept. 1, 2022), <https://afmrk.gov.kz/ru/the-list-of-organizations-and-individuals-associations/perechen-organizacziy-i-licz,-svyazannyix-s-finan/current.html>.

²⁷ See *Freedom in the World 2018*, FREEDOM HOUSE, <https://freedomhouse.org/country/kazakhstan/freedom-world/2018>; *Annual Report 2018*, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM (2018), https://www.uscirf.gov/sites/default/files/Tier2_KAZAKHSTAN.pdf.

²⁸ See *Ablyazov announced the creation of a new ‘Democratic Choice of Kazakhstan’*, RADIO AZATYQ (Apr. 20, 2017), <https://rus.azattyq.org/a/28441043.html>; see also Adam Hug, *Retreating Rights – Kazakhstan: Introduction*, THE FOREIGN POLICY CTR. (July 22, 2021), <https://fpc.org.uk/retreating-rights-kazakhstan-introduction/>.

²⁹ *How Kazakhstan’s anti-extremism blacklist forces activists, bloggers and opposition politicians into the shadows*, OPEN DEMOCRACY (Aug. 7, 2018), <https://www.opendemocracy.net/en/odr/kazakhstan-anti-extremism-blacklist/>.

³⁰ Igor Savchenko, *Report: The persecution of the DCK activists in Kazakhstan*, OPEN DIALOGUE (Apr. 2, 2018), <https://en.odfoundation.eu/a/8606,report-the-persecution-of-the-dck-activists-in-kazakhstan/>.

³¹ Ania Shukeyeva, *Kazakhstan’s ‘no choice’ election*, EMERGING EUROPE (Jan. 10, 2021), <https://emerging-europe.com/voices/kazakhstans-no-choice-election>.

³² Samuel Pitchford, *Kazakhstan Criticised Over The Persecution Of Political Activists*, HUMAN RIGHTS PULSE (Nov. 9, 2020), <https://www.humanrightspulse.com/mastercontentblog/kazakhstan-criticised-over-the-persecution-of-political-activists>.

In February 2020, a group of activists formed another opposition movement, the Koshe Party.³³ Only a few months after the Koshe Party was established, however, another unpublished court decision banned it as “extremist,” with the result being that any future involvement in its activities was criminalized under Article 405.³⁴ The European Parliament has since deemed the DCK and the Koshe Party “peaceful opposition movements”³⁵ and the U.S. State Department has described the Koshe Party’s goal as “peaceful change of the country’s authoritarian regime.”³⁶ Nonetheless, Kazakhstan has prosecuted numerous individuals for their alleged participation in or organization of the activities of DCK or Koshe, as illustrated by the following cases.

- Activist Aset Abishev was arrested on July 7, 2018 for Facebook posts “criticizing the Kazakh government and for reposting Democratic Choice messages,” with prosecutors alleging that he had “discredited the head of state, members of his family and the ruling power of the Republic of Kazakhstan.”³⁷ He was convicted under Article 405(2) and Article 266(1) (financing a criminal group) and sentenced to four years in prison on November 30, 2018.³⁸ Domestic human rights organizations and the U.S. government recognized Mr. Abishev as a political prisoner,³⁹ and on June 29, 2020, a group of U.S. senators wrote to President Tokayev, urging him to “release detainees currently serving sentences for expressing their views, including members of student groups, activists, and human rights defenders” and calling his attention to Mr. Abishev’s case.⁴⁰ After Mr. Abishev served over two and a half years in prison – during which he was reportedly punished with solitary confinement for raising concerns about COVID-19 and prison conditions⁴¹ – a court

³³ *Kazakhstan announced the creation of a new movement ‘Koshe Partiyasy’*, RADIO AZATTYQ (Feb. 18, 2020), <https://rus.azattyq.org/a/30442018.html>.

³⁴ *Kazakh Activists Start Hunger Strike to Protest Opposition Party Ban*, RADIOFREEEUROPE (June 21, 2021), <https://www.rferl.org/a/kazakh-hunger-strike-koshe-party/31318852.html>.

³⁵ *Human Rights Situation in Kazakhstan*, EUR. PARL., DOC. No. 2021/2544(RSP), ¶ 5 (Feb. 10, 2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0056_EN.pdf.

³⁶ *2020 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP’T OF STATE (Mar. 2021), pg. 40, <https://www.state.gov/wp-content/uploads/2021/10/KAZAKHSTAN-2020-HUMAN-RIGHTS-REPORT.pdf>.

³⁷ *Kazakhstan: Crackdown on Government Critics*, HUMAN RIGHTS WATCH (July 7, 2021), <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics>.

³⁸ *Report on the 2018–19 Monitoring Mission on Human Rights Compliance in the Republic of Kazakhstan*, FIDU (Apr. 2020), pg. 15, https://fidu.it/wp-content/uploads/2020/04/FIDU_Report_Mission_Kazakhstan_2020_ENG.pdf.

³⁹ *Jailed Kazakh Political Prisoner In Solitary After Slitting Wrists, Rights Group Says*, RADIOFREEEUROPE (Apr. 8, 2021), <https://www.rferl.org/a/jailed-kazakh-political-prisoner-in-solitary-after-slitting-wrists-rights-group-says/31193040.html>; *Letter from U.S. Senators to President Tokayev, Re: Political Prisoners* (June 29, 2020), <https://www.foreign.senate.gov/imo/media/doc/06-29-20%20RM%20letter%20to%20Kazakhstan%20president%20re%20political%20prisoners.pdf>.

⁴⁰ *Letter from U.S. Senators to President Tokayev, Re: Political Prisoners* (June 29, 2020), <https://www.foreign.senate.gov/imo/media/doc/06-29-20%20RM%20letter%20to%20Kazakhstan%20president%20re%20political%20prisoners.pdf>.

⁴¹ *The impact of the COVID-19 crisis on human rights in the Republic of Kazakhstan*, OPEN DIALOGUE (Apr. 30, 2020), <https://en.odfoundation.eu/a/27533,the-impact-of-the-covid-19-crisis-on-human-rights-in-the-republic-of-kazakhstan/>.

approved his early release on July 30, 2021.⁴² Only six months after Mr. Abishev's release, he attempted to participate in the January Protests; enroute to the demonstrations, he was arrested, detained, and reportedly tortured for four days by Kazakh security forces.⁴³

- In late 2019, activist Serik Zhakhin was prosecuted under Article 405(2) for posting information about the banned DCK on his Facebook page.⁴⁴ After being held in pretrial detention for several months, he was convicted, fined, and sentenced to one year of restricted movement and a two-year ban on social media use and public activism.⁴⁵
- In May 2020, blogger Azamat Baikenov⁴⁶ was convicted under Article 405(2) for participation in the DCK.⁴⁷ As evidence, the prosecution presented a series of private messages and social media posts as well as the conclusions of government experts finding that Mr. Baikenov's posts "formed Kazakhstani citizens' negative attitude to the authorities and encouraged them to take actions aimed at changing the government."⁴⁸ Mr. Baikenov alleged judicial bias, pointing to the lack of evidence proving his affiliation with the DCK.⁴⁹ He was sentenced to one year of restricted freedom and received a fine.⁵⁰
- In November 2020, teacher and activist Nurbol Onerkhan was convicted under Article 405(2) for alleged membership in the DCK.⁵¹ Although Mr. Onerkhan had criticized the government on social media, he denied being a member of DCK.⁵² He was sentenced to one year of restricted

⁴² *Jailed Kazakh Opposition Activist Released from Prison*, RADIOFREEEUROPE (July 30, 2021), <https://www.rferl.org/a/kazakh-activist-abishev-released/31385758.html>.

⁴³ Valerie Hopkins, *In Kazakh Uprising, Reports of Widespread Abuses by Security Forces*, THE N.Y. TIMES (Jan 31, 2022), <https://www.nytimes.com/2022/01/31/world/europe/kazakhstan-uprising-abuse-torture.html>.

⁴⁴ *Kazakhstan: A Tightening Grip on Civil Society: Ongoing Persecution of Activists Across the Country*, INT'L P'SHIP FOR HUMAN RIGHTS (Jan. 6, 2020), <https://www.iphronline.org/kazakhstan-a-tightening-grip-on-civil-society-ongoing-persecution-of-activists-across-the-country.html>.

⁴⁵ *2019 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP'T OF STATE (Mar. 2020), pg. 15, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

⁴⁶ *Azamat Baikenov*, JUSTICE FOR JOURNALISTS (Dec. 15, 2019), <https://jff.fund/jff/sobytie-azamat-baikenov/>.

⁴⁷ *2020 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP'T OF STATE (Mar. 2021), pg. 23, <https://www.state.gov/wp-content/uploads/2021/10/KAZAKHSTAN-2020-HUMAN-RIGHTS-REPORT.pdf>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 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* (Sept. 29, 2020), <https://www.helmut-scholz.eu/kontext/controllers/document.php/121.c/1/d1af9d.pdf>.

⁵² *'No Regrets': Kazakh Activist Continues to Fight Despite Losing his Freedom, Job for Criticizing Government*, RADIOFREEEUROPE (Feb. 27, 2020), <https://www.rferl.org/a/kazakh-activist-onerkhan-jailed-loses-job-criticizing-government/30458306.html>.

freedom⁵³ and later sentenced to six months in prison for violating the terms of his probation.⁵⁴

- In May 2021, a court convicted activist Abaibek Sultanov and sentenced him to one year of restricted freedom under Article 405(2) for allegedly participating in the Koshe Party's activities.⁵⁵ He was also banned from engaging in public and social activism for three years.⁵⁶ According to Human Rights Watch, the court relied on a government linguistic expert's opinion, which analyzed videos Mr. Sultanov had posted to his Facebook page and concluded he was a member of the Koshe Party:⁵⁷ the verdict found that Mr. Sultanov's posts gave "a negative assessment of the authorities."⁵⁸

In 2021, human rights organizations in Kazakhstan estimated that there were 124 individuals with active cases under Article 405.⁵⁹

Notably, in its most recent Concluding Observations on Kazakhstan in 2016, 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."⁶⁰ In 2020, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed concern "about the use of the term 'extremism' in national law and practice," stating: "in the last five years, dozens of civil society activists, bloggers and religious figures have been held criminally liable and dozens more arrested and detained under the provisions on extremism, suggesting overly broad application of criminal punishment for displaying dissenting opinion."⁶¹

⁵³ *Kazakhstan: Crackdown on Government Critics*, HUMAN RIGHTS WATCH (July 7, 2021), <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics>.

⁵⁴ *Restriction of Freedom Replaced with Imprisonment for Activist Nurbol Onerkhan*, RADIO AZATTYQ (May 4, 2021), <https://rus.azattyq.org/a/31237594.html>.

⁵⁵ *Another Kazakh Activist Sentenced For Links To Banned Political Group*, RADIOFREEEUROPE (May 14, 2021), <https://www.rferl.org/a/kazakh-activist-sultanov-sentenced-dvk-banned-ablyazov/31255004.html>.

⁵⁶ *Id.*

⁵⁷ *Kazakhstan: Crackdown on Government Critics*, HUMAN RIGHTS WATCH (July 7, 2021), <https://www.hrw.org/news/2021/07/07/kazakhstan-crackdown-government-critics>.

⁵⁸ *Id.*

⁵⁹ "Mallet for neutralization." *Is Article 405 a tool against unwanted people?*, TIREK (Mar. 29, 2021), <http://tirik.info/kolotushka-dlya-nejtralizatsii-405-ya-statya-instrument-protiv-neugodnyh/>.

⁶⁰ U.N. Human Rights Comm., *Concluding Observations on the second periodic report of Kazakhstan*, U.N. Doc. CCPR/C/KAZ/CO/2, (Aug. 9, 2016), ¶ 13, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2FKAZ%2FCO%2F2.

⁶¹ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on her visit to Kazakhstan* (Jan. 22, 2020), <https://digitallibrary.un.org/record/3852204?ln=ar>.

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. Freedom House has stated that at the pretrial stage the "police reportedly engage in arbitrary arrests and detentions, and violate detained suspects' right to assistance from a defense lawyer."⁶² 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."⁶³ According to Freedom House, pretrial detention is often lengthy.⁶⁴ There have been reports of poor conditions in detention, such as lack of access to medical care and physical abuse.⁶⁵

At trial, there are serious concerns about a lack of judicial independence.⁶⁶ In a 2021 report on Kazakhstan, Freedom House stated: "[t]he judiciary is effectively subservient to the executive branch, with the president nominating or directly appointing judges based on the recommendation of the Supreme Judicial Council ... [and judges] are subject to political influence, and corruption is a problem throughout the judicial system."⁶⁷

The 2020 U.S. State Department human rights report on Kazakhstan similarly noted: "[t]he executive branch... sharply limited judicial independence ... Prosecutors enjoyed a quasi-judicial role and had the authority to suspend court decisions."⁶⁸ And 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

⁶² *Freedom in the World 2021: Kazakhstan*, FREEDOM HOUSE, <https://freedomhouse.org/country/kazakhstan/freedom-world/2021>.

⁶³ *2020 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP'T OF STATE (Mar. 2021), pg. 13, <https://www.state.gov/wp-content/uploads/2021/10/KAZAKHSTAN-2020-HUMAN-RIGHTS-REPORT.pdf>.

⁶⁴ *Freedom in the World 2021: Kazakhstan*, FREEDOM HOUSE, <https://freedomhouse.org/country/kazakhstan/freedom-world/2021>.

⁶⁵ Farangis Najibullah, *Kazakh Prisoners Packed in Cells, Endure 'Degrading' Conditions During Coronavirus Lockdown*, RADIOFREEEUROPE (Sept. 14, 2020), <https://www.rferl.org/a/kazakh-prisoners-packed-in-cells-endure-degrading-conditions-in-coronavirus-lockdown/30838547.html>; U.N. Human Rights Comm., *Concluding Observations on the Second Periodic Report of Kazakhstan*, U.N. Doc. CCPR/C/KAZ/CO/2, (Aug. 9, 2016), ¶¶ 31–32, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2FKAZ%2FCO%2F2; *2020 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP'T OF STATE (Mar. 2021), pgs. 4–6, <https://www.state.gov/wp-content/uploads/2021/10/KAZAKHSTAN-2020-HUMAN-RIGHTS-REPORT.pdf>.

⁶⁶ *2019 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP'T OF STATE (Mar. 2020), pg. 9, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

⁶⁷ *Freedom in the World 2021: Kazakhstan*, FREEDOM HOUSE, <https://freedomhouse.org/country/kazakhstan/freedom-world/2021>.

⁶⁸ *2020 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP'T OF STATE (Mar. 2021), pg. 11, <https://www.state.gov/wp-content/uploads/2021/10/KAZAKHSTAN-2020-HUMAN-RIGHTS-REPORT.pdf>.

safeguards against “undue influence” from the executive branch as well as low rates of acquittal.⁶⁹

The Human Rights Committee has also remarked on non-compliance with the principle of equality of arms, describing the prosecution as “retain[ing] wide powers” in criminal proceedings.⁷⁰ As the U.S. State Department has observed, other challenges facing defense lawyers include “lack of access to government-held evidence, frequent procedural violations, [and] denial of defense counsel motions.”⁷¹ The COVID-19 pandemic may have exacerbated these problems. With criminal trials in Kazakhstan moving to video conference platforms, “many activists believe that online trials with bad Internet connections have made it easier for authorities to punish its opponents.”⁷²

The trials of activist Alnur Ilyashev and journalist Aigul Utepova, monitored by TrialWatch, highlight the abuses described above. A TrialWatch report on Mr. Ilyashev’s case by TrialWatch Expert Vânia Costa Ramos and staff at the American Bar Association Center for Human Rights found that the trial court had “continuously issued unreasoned rulings to the detriment of the defense, severely undermining Mr. Ilyashev’s ability to make his case and violating the guarantee of judicial impartiality.”⁷³ Further, Mr. Ilyashev’s trial, held over Zoom, “demonstrated the potential perils of virtual hearings. Due to technical issues, the feed was constantly interrupted, with the result that the defense was prevented from making motions, presenting arguments, and questioning witnesses.”⁷⁴ The prosecution also failed to meet its burden of proof and the convicting judgment unequivocally accepted the opinions of government expert witnesses while ignoring all defense arguments and evidence.⁷⁵

Similarly, in Ms. Utepova’s case, the TrialWatch report found that 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.”⁷⁶ In this vein, the UN

⁶⁹ U.N. Human Rights Comm., *Concluding Observations on the Second Periodic Report of Kazakhstan*, U.N. Doc. CCPR/C/KAZ/CO/2 (Aug. 9, 2016), ¶ 37, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FCO%2FAZ%2FCO%2F2.

⁷⁰ *Id.*

⁷¹ *2020 Country Report on Human Rights Practices: Kazakhstan*, U.S. DEP’T OF STATE (Mar. 2021), pg. 14, <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kazakhstan/>.

⁷² Farangis Najibullah, ‘Prosecutor Pretended He Couldn’t Hear Me!’ *Kazakhstan’s Online Trials Raise Concerns of Rights Violations*, RADIOFREEEUROPE (Sept. 29, 2020), <https://www.rferl.org/a/kazakhstan-online-trials-concerns-rights-violations/30864919.html>.

⁷³ Vânia Costa Ramos & Am. Bar Ass’n Ctr. For Human Rights, *TrialWatch Fairness Report: Kazakhstan v. Alnur Ilyashev*, (Mar. 11, 2021), https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/fair-trial-report-kazakhstan-alnur-ilyashev.pdf.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *TrialWatch Fairness Report: Kazakhstan v. Aigul Utepova*, (Apr. 27, 2022), <https://cfj.org/wp-content/uploads/2022/04/EN-Aigul-Utepova-Fairness-Report-April-2022.pdf>.

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has cited “an overreliance on ‘judicial experts’” by the Kazakh authorities 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.”⁷⁷

B. CASE HISTORY

Askhat Zheksebaev is a small business proprietor and a political and civil activist.⁷⁸ The Kazakh government has repeatedly tried to stifle his activism through administrative charges and criminal prosecution.

Administrative Arrests

Starting in 2019, Kazakh law enforcement has targeted Mr. Zheksebaev with administrative charges for participation in rallies, campaigns, and pickets. On February 15, 2019, after he participated in a protest, Mr. Zheksebaev was convicted and fined by a court in Almaty under Article 443 of the Code of Administrative Offenses of the Republic of Kazakhstan (“Administrative Code”), which penalizes insubordination against a law enforcement officer.⁷⁹ On September 16, 2019, a court in Almaty sentenced Mr. Zheksebaev and one other activist to ten days of administrative detention following their participation in an unsanctioned rally; in this case, he was convicted under Article 488 of the Administrative Code, which individuals can violate by failing to obtain advance permission from the Kazakh authorities for rallies, marches, pickets, and demonstrations.⁸⁰ During his administrative detention, Mr. Zheksebaev was reportedly not allowed access to a lawyer.⁸¹

On October 12, 2019, Mr. Zheksebaev, along with two other activists, picketed for the release of political prisoners and an end to government persecution of civil activists.⁸²

⁷⁷ U.N. 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, (Jan. 22, 2020), ¶ 39, https://digitallibrary.un.org/record/3852204/files/A_HRC_43_46_Add-1-ES.pdf.

⁷⁸ Manshuk Asautai, *Trial of 13 activists: “while they were under arrest, one lost his son, the other lost his father”*, RADIO AZATTYQ (Oct. 4, 2021), <https://rus.azattyq.org/a/kazakhstan-almaty-trial-of-thirteen-activists-stories/31491758.html>.

⁷⁹ Criminal Indictment (July 2, 2021); Administrative Code of the Republic of Kazakhstan [Kazakhstan Administrative Code] art. 433, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/108231/133661/F639572527/KAZ108231_ENG.pdf.

⁸⁰ *Two Activists Given 10 Days of Arrest for “Participating in a Rally” in Almaty*, RADIO AZATTYQ (Sept. 17, 2019), <https://rus.azattyq.org/a/30168285.html>; Kazakhstan Administrative Code, art. 488.

⁸¹ *Two Activists Given 10 Days of Arrest for “Participating in a Rally” in Almaty*, RADIO AZATTYQ (Sept. 17, 2019), <https://rus.azattyq.org/a/30168285.html>.

⁸² Zhanbota Alzhanova & Bakhytzhan Toregozhina, *Political Prisoners and Political Persecutions in the Republic of Kazakhstan 2019*, KAZAKHSTAN INTERNATIONAL BUREAU FOR HUMAN RIGHTS AND RULE OF LAW (Jan. 19, 2020), [https://bureau.kz/files/bureau/Docs/Reports/2020/Political%20prisoners%20\(ENG\).pdf](https://bureau.kz/files/bureau/Docs/Reports/2020/Political%20prisoners%20(ENG).pdf).

While Mr. Zheksebaev was protesting, a police officer approached and told him to leave.⁸³ He refused. On October 22, 2019, a court in Almaty found Mr. Zheksebaev and the two other activists guilty of violating Article 488 of the Administrative Code.⁸⁴ Mr. Zheksebaev received a sentence of ten days of administrative detention.⁸⁵

On November 15, 2019, Mr. Zheksebaev and another civil society activist, Murat Shormanov, protested the detention and trial of four DCK members in front of the relevant courthouse.⁸⁶ That evening, police came to both activists' homes and arrested and transported them to local police stations.⁸⁷ On November 16, 2019, Mr. Zheksebaev was tried in administrative court and sentenced to 15 days of detention.⁸⁸

Mr. Zheksebaev was subsequently arrested and detained several times in 2020, including the following instances:

- On February 14, 2020, Mr. Zheksebaev was sentenced to 15 days of detention after participating in demonstrations.⁸⁹
- On April 10, 2020, Mr. Zheksebaev was sentenced to 5 days of detention for allegedly violating a state of emergency under the Administrative Code.⁹⁰
- On June 18, 2020, Mr. Zheksebaev was sentenced to 15 days of detention for violating legislative provisions on assemblies.⁹¹
- On July 2, 2020, Mr. Zheksebaev was sentenced to 5 days of detention for alleged insubordination against a law enforcement officer.⁹²

Charges in the Criminal Case

Despite these administrative arrests and detentions, Mr. Zheksebaev persisted in undertaking peaceful activism, leading to his criminal indictment under Article 405(1) and

⁸³ *Almaty Activist Askhat Zheksebaev Demands Release of Political Prisoners*, VLAST (Oct. 14, 2019), <https://vlast.kz/novosti/35656-v-almaty-aktivist-ashat-zeksebaev-trebuets-osvobodzenia-politzaklucennyh.html>.

⁸⁴ *Kazakhstan: Civil Society Activists Intimidated, Harassed and Imprisoned*, CIVICUS MONITOR (July 2, 2020), <https://monitor.civicus.org/updates/2020/02/07/kazakhstan-civil-society-activists-intimidated-harassed-and-imprisoned/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Court in Almaty Sentences Two Activists to Arrest for 15 Days*, RADIO AZATTYQ (Nov. 16, 2019), <https://rus.azattyq.org/a/30275325.html>.

⁸⁸ *Id.*

⁸⁹ Manshuk Asautai, *'Authorities are getting ready.' Planned rally and detention of activists*, RADIO AZATTYQ (Feb. 18, 2020), <https://rus.azattyq.org/a/kazakhstan-arrests-of-opposition-activists/30440773.html>.

⁹⁰ Criminal Indictment (July 2, 2021).

⁹¹ *Id.*

⁹² *Id.*

(2) in July 2021. According to the indictment, Mr. Zheksebaev's guilt would be shown from the following series of acts. First, from April–May 2020 Mr. Zheksebaev posted or participated in the following videos supporting the Koshe Party on social media pages:

- On April 16, 2020, Mr. Zheksebaev posted a video of himself on Facebook in which he encouraged people to join the Koshe Party.⁹³
- On April 18, 2020, Mr. Zheksebaev posted a video of himself on Facebook wearing a Koshe Party t-shirt and discussing the advantages of wearing a 'Zhuka' armband – a symbol of peaceful protesting and solidarity – during rallies.⁹⁴
- On May 5, 2020, Mr. Zheksebaev posted a video of himself on Facebook with a Koshe Party flag in the background, in which he shared reasons to join the movement, invited people to join, and criticized the Kazakh government.⁹⁵
- On May 11, 2020, Mr. Zheksebaev re-posted a video on Facebook from the Koshe Party YouTube channel titled "We will be worthy of our grandfathers," in which Mr. Zheksebaev stood against the background of a Koshe Party flag, criticized the Kazakh government, and stated that, "We the 'Koshe Party' movement, unite with all those people who want to be truly independent, develop, and want to prosper, and I urge you to unite in our movement 'Koshe Party.'"⁹⁶
- On May 12, 2020, the Koshe Party YouTube channel posted a video of Mr. Zheksebaev and several other apparent Koshe Party members; Mr. Zheksebaev was featured wearing a 'Zhuka' armband while he and the others in the video practiced linking arms in preparation for a potential police confrontation at a rally.⁹⁷
- On May 23, 2020, Mr. Zheksebaev posted a video on Facebook in which he said that he was "one of the leaders of the peaceful opposition movement 'Koshe Party,'" and in which he, as well as other activists, expressed their dissatisfaction with the Yesil court's ruling that the Koshe Party was "extremist."⁹⁸

Second, Mr. Zheksebaev exchanged the following private Telegram messages relating to the Koshe Party in June 2020:

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

- From June 1–4, 2020, Mr. Zheksebaev sent messages to a Telegram user providing instructions on how to film videos opposing police violence and political persecution, and how to distribute videos to a Koshe Party group chat.⁹⁹
- From June 1–6, 2020, Mr. Zheksebaev sent messages to a Telegram user discussing talks that were underway for an unauthorized rally in Almaty.¹⁰⁰
- On June 2, 2020, Mr. Zheksebaev received a message from a Telegram user, who said “We need rallies. Rallies decide everything!!!”¹⁰¹
- On June 2, 2020, Mr. Zheksebaev corresponded with a Telegram user about “unauthorized rallies,”¹⁰² distribution of a video message in a Koshe Party group chat, and the preparation of ‘Zhuka’ armbands.¹⁰³
- From June 5–6, 2020, Mr. Zheksebaev exchanged messages with a Koshe Party activist, noting that talks were “underway on the coordination of actions, plans and preparation for the upcoming unauthorized rally scheduled in Almaty,”¹⁰⁴ and discussing the preparation of posters and backpacks for the rally.¹⁰⁵
- On June 6, 2020, Mr. Zheksebaev received a video message from an activist, who said: “Today at 11:00 a rally will be held near the Palace of the Republic of Almaty. Now we are getting ready to go to the rally. I want to tell you that we need democracy immediately, otherwise we will lose our lands, lose our wealth. Where there is unity, there is life. Together we are strong!”¹⁰⁶
- On June 6, 2020, Mr. Zheksebaev corresponded with two other activists over Telegram regarding the rally in Almaty.¹⁰⁷
- During the month of June, Mr. Zheksebaev was the administrator of a group chat called “Parliament,” which included several other activists and discussed upcoming rallies and Koshe Party finances.¹⁰⁸

In addition to the aforementioned alleged acts, the indictment references a meet-up on July 19, 2020, when Mr. Zheksebaev and three other activists rented an apartment in Nur-Sultan to help construct a house for the family of a Koshe Party member who had

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

recently died while in detention.¹⁰⁹ The indictment alleges that during the time that the house was being constructed the activists “planned in the near future to hold a series of protest actions together with ... supporters of DCK, Koshe Party.”¹¹⁰ The indictment further references “55 presented videos” introduced into evidence, but no further information is provided.¹¹¹

As mentioned above, on May 19, 2020 the Yesil District Court, in an unpublished decision, ruled that the Koshe Party was an “extremist organization.”¹¹² The decision went into legal effect on June 26, 2020.¹¹³ After the ban went into legal effect, Mr. Zheksebaev maintains that he and other Koshe Party members stopped all recruitment, advertising, and activities for the party.¹¹⁴

On August 22, 2020, Mr. Zheksebaev was detained.¹¹⁵ According to reporting from Radio Azattyq, after his arrest the police searched Mr. Zheksebaev’s house when only a minor child was present and confiscated a computer and several cell phones, which were later returned in severely damaged condition.¹¹⁶ On the same date some of Mr. Zheksebaev’s co-defendants – fellow Koshe Party members and activists – were also arrested, with one such individual confirming that his “phones and office equipment were seized.”¹¹⁷

Pretrial Detention

After his arrest, Mr. Zheksebaev was placed in pretrial detention.¹¹⁸ Mr. Zheksebaev’s co-defendants were likewise placed in pretrial detention.¹¹⁹ TrialWatch did not have access to the underlying detention orders and the following is based on media reporting.

On August 23, 2020 a court in Almaty reportedly imposed detention on the “suspicion” that Mr. Zheksebaev had been participating in a “banned organization.”¹²⁰ On October

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Monitor Notes (Aug. 17, 2021).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Activist arrested in Almaty on suspicion of participating in banned ‘Koshe Partyasy’*, MEDIAZONA, (Aug. 24, 2020), <https://mediazona.ca/news/2020/08/24/koshe-party>; Manshuk Asautai, *Trial of 13 activists: “while they were under arrest, one lost his son, the other lost his father”*, RADIO AZATTYQ (Oct. 4, 2021), <https://rus.azattyq.org/a/kazakhstan-almaty-trial-of-thirteen-activists-stories/31491758.html>.

¹¹⁶ Manshuk Asautai, *Trial of 13 activists: “while they were under arrest, one lost his son, the other lost his father”*, RADIO AZATTYQ (Oct. 4, 2021), <https://rus.azattyq.org/a/kazakhstan-almaty-trial-of-thirteen-activists-stories/31491758.html>.

¹¹⁷ Monitor Notes (Sept. 23, 2021).

¹¹⁸ *The detention of activists detained in connection with the ‘street party’ has been extended*, CENT. ASIAN (Oct. 15, 2020), <https://www.centralasian.org/a/30894440.html>.

¹¹⁹ Manshuk Asautai, *Trial of 13 activists: “while they were under arrest, one lost his son, the other lost his father”*, RADIO AZATTYQ (Oct. 4, 2021), <https://rus.azattyq.org/a/kazakhstan-almaty-trial-of-thirteen-activists-stories/31491758.html>.

¹²⁰ *Court in Kazakhstan extends arrest of four untried activists for another month*, CENT. ASIAN (Jan. 20, 2021), <https://www.centralasian.org/a/31055862.html>.

14, 2020, Mr. Zheksebaev's detention was extended for an additional two months, with the stated justification that investigators needed time to "inspect [the activists'] confiscated phones and computers."¹²¹ On December 15, 2020, the court again extended Mr. Zheksebaev's detention, reportedly on the "suspicion" that he was involved in "creating an extremist group."¹²² On January 20, 2021, the court extended Mr. Zheksebaev's detention for another month on the grounds that it was necessary to complete investigations.¹²³ Further extension orders followed.

On April 5, 2021, G. Kazhibayev, the senior investigator of the Police Department of Almaty, issued a document of "qualifications" for the criminal case – essentially a draft of the charges for the indictment.¹²⁴ The document referenced Mr. Zheksebaev's social media postings about the Koshe Party as well as his administrative arrests, alleging that he had participated in and organized "extremist" activities.¹²⁵

On July 2, 2021, the Assistant Prosecuting Attorney of the City of Almaty formally issued an indictment charging Mr. Zheksebaev and twelve other Koshe Party activists – who, as mentioned above, had also been arrested for their involvement with the Koshe Party and held in pretrial detention¹²⁶ – under Article 405 of the Criminal Code.¹²⁷ Shortly thereafter, on July 27, 2021, the trial of Mr. Zheksebaev and his co-defendants began at the Almalinskiy District Court in Almaty.¹²⁸ It was held over Zoom. Mr. Zheksebaev and the other defendants participated over video conference from the maximum-security prison where they were detained.¹²⁹

Trial

As mentioned above, save for one event all of the specific acts alleged in the indictment took place before the decision banning Koshe went into legal effect. To preempt this issue, the prosecution argued that the Koshe Party was an extension of the DCK and that "in order to continue the extremist activities of the unregistered movement 'DCK,'" Mr.

¹²¹ *The detention of activists detained in connection with the 'street party' has been extended*, CENT. ASIAN (Oct. 15, 2020), <https://www.centralasian.org/a/30894440.html>.

¹²² *Detention of 4 activists extended in Kazakhstan*, CENT. ASIAN (Dec. 15, 2020), <https://www.centralasian.org/a/31002359.html>.

¹²³ *An Almaty investigative court has extended the detention of four activists*, CENT. ASIAN (Jan. 21, 2021), <https://www.centralasian.org/a/31056015.html>.

¹²⁴ *Qualification of the act of Askhat Zheksebayev* (Apr. 22, 2021), <http://tired.info/kvalifikatsiya-deyaniya-ashata-zheksebaeva/>.

¹²⁵ *Id.*

¹²⁶ Manshuk Asautai, *Trial of 13 activists: "while they were under arrest, one lost his son, the other lost his father"*, RADIO AZATTYQ (Oct. 4, 2021), <https://rus.azattyq.org/a/kazakhstan-almaty-trial-of-thirteen-activists-stories/31491758.html>.

¹²⁷ Criminal Indictment (July 2, 2021).

¹²⁸ Monitor Notes (July 27, 2021).

¹²⁹ See *id.*; Monitor Notes (Sept. 22, 2021).

Zheksebaev, “together with his associates and leaders of the ‘DCK’ ... took measures to change the name and transform it to ‘Koshe Party.’”¹³⁰

The prosecution offered scant evidence in support of this assertion beyond the court decision banning the Koshe Party: per the indictment, “this fact of changing the name of ‘DCK’ to ‘Koshe Party’ was established by the Yesil District Court of Nur-Sultan city on 05.19.2020.”¹³¹ As described below, however, the decision was unpublished and the prosecution refused to provide this decision to the defense. Meanwhile, the defense argued that DCK and Koshe were different parties, with different membership and goals.¹³²

Access to the Court Decisions

Throughout the trial, defense counsel repeatedly requested access to the decisions banning the DCK and the Koshe Party: for example, on August 17, 2021, one defendant’s lawyer stated that “a petition was sent through the court office for a court decision banning the DCK and Koshe party ... [s]ince the entire charge is based on these decisions.”¹³³ Subsequently, on August 19, 2021, the judge promised that “[a]t the next [hearing] the prosecutors will present the decision[s] of the Yesil court.”¹³⁴ However, at the following court session on August 20, 2021, the prosecution did not provide the decisions. In response, Mr. Zheksebaev’s lawyer emphasized that without access to the decisions the proceedings constituted a “one-sided trial,” stating that the prosecution’s “failure to comply with the court’s requirement to provide basic evidence of materials, in particular by a court decision ... [is] an attempt to obstruct.”¹³⁵

Again, on August 24, 2021, Mr. Zheksebaev’s lawyer observed that “[t]he case d[id] not contain a decision of the [Y]esil court” and argued that it was “unclear why the prosecutor’s office still d[id] not provide [the decisions].”¹³⁶ In response to other defense lawyers’ demands for the decision, the prosecutor stated: “the decision to ban the DCK, KP, was in all the media ... there were explanations everywhere, so I think that this is enough.”¹³⁷ When the defense again requested the decisions, the prosecutor answered: “I do not have [the decisions] in my arms at this time.”¹³⁸

During the session on September 7, 2021, Mr. Zheksebaev’s lawyer reemphasized that he was “waiting for the prosecutor to present decisions on the DCK and Koshe Party.”¹³⁹

¹³⁰ Criminal Indictment (July 2, 2021).

¹³¹ *Id.*

¹³² See Monitor Notes (Aug. 17, 2021).

¹³³ *Id.*

¹³⁴ Monitor Notes (Aug. 19, 2021).

¹³⁵ Monitor Notes (Aug. 20, 2021).

¹³⁶ Monitor Notes (Aug. 24, 2021).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Monitor Notes (Sept. 7, 2021).

In response, the judge, contradicting his previous statements, stated: “the prosecutor gave an exhaustive answer. And this issue has been resolved.”¹⁴⁰

On September 10, 2021, defense counsel again commented: “the presiding judge has repeatedly instructed the state prosecutors to attach to the materials ... [the Yesil] court [decisions] banning the DCK and Koshe Party. However, this instruction has not been implemented so far.”¹⁴¹

During the session on September 17, 2021, Mr. Zheksebaev’s lawyer stated that the defendants were entitled to “investigate all materials [from] the prosecutor’s office” related to the Yesil court decisions.¹⁴² Although the judge acknowledged this request, noting “I understand,” he did not require the prosecution to provide the decisions.¹⁴³ Generally, each time the defense requested the decisions, the prosecutor would promise to “provide [them] for the next meeting,”¹⁴⁴ and would then fail to do so, with no reaction from the court.

On September 22, 2021, one defendant disconnected from the Zoom video-conference link because of the prosecution’s failure to provide the decisions and another threatened to, after which a defendant’s lawyer argued that “the state prosecution did not provide the main evidence on which the entire charge against all 13 defendants is based.”¹⁴⁵ The prosecutor responded that this would be “a deliberate delay in the process and [that] they disrupt the process.”¹⁴⁶ Subsequently, when the prosecutor again failed to provide the court decisions at the next court session, the judge ignored defendants’ further requests for the decisions, instructing them to “please ... not interrupt the process,” and stating that the issue of the decisions had already “been discussed in previous court hearings.”¹⁴⁷

The Government’s ‘Expert’ Opinions

To support its case that Mr. Zheksebaev organized and participated in the activities of a banned organization, the indictment cites three reports written by government experts that, among other things, concluded that Mr. Zheksebaev’s actions had “aimed at changing the government and changing the situation in the country as a whole.”¹⁴⁸ TrialWatch had access to two of these reports, Expert Conclusion No. 4337 and Expert Conclusion No. 6315. According to the indictment, the third report, Expert Conclusion No. 4876, dated September 22, 2020, analyzed, among other things, recorded

¹⁴⁰ *Id.*

¹⁴¹ Monitor Notes (Sept. 10, 2021).

¹⁴² Monitor Notes (Sept. 17, 2021).

¹⁴³ *Id.*

¹⁴⁴ Monitor Notes (Aug. 17, 2021).

¹⁴⁵ Monitor Notes (Sept. 22, 2021).

¹⁴⁶ *Id.*

¹⁴⁷ Monitor Notes (Sept. 23, 2021).

¹⁴⁸ Expert Conclusion No. 4337 (Aug. 26, 2020); see also Expert Conclusion No. 6315 (Jan. 25, 2021).

communications between Mr. Zheksebaev and Koshe activists and concluded that the language used could cause people to “develop ... a negative, critical attitude towards the existing government in the Republic of Kazakhstan” (the two other reports reach similar conclusions).¹⁴⁹

Expert Conclusion No. 4337, dated August 26, 2020, was compiled by four psychological and linguistic specialists from the Institute of Forensic Examinations in Almaty.¹⁵⁰ TrialWatch did not have access to the materials examined by the authors: the materials are not specified in the report but appear to have included a range of recorded communications between Mr. Zheksebaev and Koshe activists. Expert Conclusion No. 4337 finds that “the conversations under study are united by a common theme and are aimed at informing [people about] the Koshe Party movement,” the “purpose of which is to... express... a negative assessment of the current government” and is “aimed at a change of power, as well as the resignation of the government.”¹⁵¹ The prosecution relied on this report in the indictment to argue that Mr. Zheksebaev was “encouraging people to join the Koshe Party movement, to participate in protest actions, and to change the government.”¹⁵²

Expert Conclusion No. 6315, dated January 25, 2021, was authored by a commission of three individuals – two of whom also authored Expert Conclusion No. 4337 – from the Institute of Forensic Examinations in Almaty.¹⁵³ TrialWatch did not have access to the materials examined by the authors: the materials are not specified in the report but appear to have included a range of recorded communications between Mr. Zheksebaev and Koshe activists. Expert Conclusion No. 6315 finds that the speech at issue communicated a “negative assessment of the situation in the Republic of Kazakhstan and the activities of the authorities.”¹⁵⁴ The report also concludes that “[t]hematically, the studied conversations are united by a general theme, which is defined as a discussion of common activities related to the organization of various rallies, protests” and contain information “about the activities of the organization Koshe Party, trials and arrests of activists, the discussion of holding a rally, support in the courts, [and] attracting people to participate in rallies.”¹⁵⁵

Notably, in response to a question posed by investigators about whether “the materials submitted for the study contain appeals, discussion plans ... [for] the commission of extremist crimes,” Expert Conclusion No. 6315 states that the “content of the analyzed materials does not contain calls for a violent seizure of power [or] a violent change in the

¹⁴⁹ Criminal Indictment (July 2, 2021)

¹⁵⁰ Expert Conclusion No. 4337 (Aug. 26, 2020)

¹⁵¹ *Id.*

¹⁵² Criminal Indictment (July 2, 2021).

¹⁵³ Expert Conclusion No. 6315 (Jan. 25, 2021).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

constitutional order of the Republic of Kazakhstan,” and that “[t]hus, in the content of the presented materials there is no call for forcible seizure of power.”¹⁵⁶ While acknowledging this finding about the lack of a “call for forcible seizure of power,” the prosecution used Expert Conclusions Nos. 4337 and 6315 to argue that Mr. Zheksebaev had encouraged a “negative, critical attitude towards the existing government in the Republic of Kazakhstan” and had “aimed at encouraging people to participate in rallies and protests.”¹⁵⁷

When defense counsel asked to cross-examine the report authors so that they could “explain how they came to such conclusions,” the judge held that “the interrogations of experts ... are also attached to the [case] materials” and that they did not need to be called as witnesses because they had been “warned” about giving false conclusions.¹⁵⁸

Timing of Acts Alleged

One of the key issues on which the prosecution’s case hinged was the timing of the acts alleged. Given that almost all of the specific conduct cited in the indictment occurred before the banning of the Koshe Party went into legal effect, the prosecution argued that the Koshe Party and DCK were one and the same: “in order to continue the extremist activities of the unregistered ‘DCK’ movement, A. E. Zheksebaev, being one of the leaders of this movement, deliberately, out of mercenary interests and in order to avoid liability for this, since December 2019 together with his fellow members and leaders of the ‘DVK’ took measures to change the name and transform it to ‘Koshe Party.’”¹⁵⁹ To support this conclusion, the prosecution cited the unpublished court decision banning the Koshe Party.¹⁶⁰ In contrast, the defense argued that Koshe was a different movement than the DCK and various defendants stated that they only considered themselves members of Koshe, not the DCK.¹⁶¹

During the August 17, 2021 court session, the parties questioned Mr. Zheksebaev.¹⁶² The prosecutor’s cross-examination focused on the Koshe Party’s response to the May 19, 2020 Yesil court decision.¹⁶³ Mr. Zheksebaev maintained that although Koshe Party members stayed in correspondence regarding the movement, they “stopped all advertisements, appeals, publications” and “all activities of the Koshe Party” when the court decision went into legal effect on June 26, 2020.¹⁶⁴

¹⁵⁶ *Id.*

¹⁵⁷ Criminal Indictment (July 2, 2021).

¹⁵⁸ Monitor Notes (Sept. 23, 2021).

¹⁵⁹ Criminal Indictment (July 2, 2021).

¹⁶⁰ *Id.*

¹⁶¹ See Monitor Notes (Aug. 17, 2021).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

At the August 17 hearing, the prosecutor expressed particular interest in an event that transpired on July 19, 2020 (indeed, the only specific act mentioned in the indictment that occurred after the June 26 deadline), when Mr. Zheksebaev and several other Koshe Party members rented an apartment in Nur-Sultan to assist in constructing a house for the family of a deceased Koshe Party member who had died while in state custody.¹⁶⁵ In questioning Mr. Zheksebaev about this incident, the prosecutor noted that one of the government expert opinions had concluded that by gathering in Nur-Sultan to build the house, Koshe Party members had “attract[ed] people” to the movement.¹⁶⁶ Mr. Zheksebaev responded that while in Nur-Sultan for the house construction, he did not discuss “join[ing] the Koshe Party or tak[ing] part in the movement of the Koshe Party,” and that conversations were limited to the challenges facing civic activists, what the Koshe Party had achieved in the past, and the banning of the Koshe Party.¹⁶⁷

Petitions for Recusal

Throughout the trial, the defense argued that the judge was overseeing “the case in a biased manner, unilaterally with an accusatory bias... [and] repeatedly violated [the defendants’] constitutional and legal rights.”¹⁶⁸

As noted above, the court refused to let the defense question the authors of the Expert Conclusions. Additionally, the court reviewed 78 volumes of evidence (at approximately 170 pages per volume) from the pretrial process – a standard practice in Kazakh court hearings, so that parties may become fully acquainted with evidence – in just a few hours, which one of the defense lawyers called “unthinkable.”¹⁶⁹ Based on such actions, the defense lawyers petitioned for the judge’s recusal five times during the course of the trial.¹⁷⁰

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Monitor Notes (Sept. 10, 2021).

¹⁶⁹ Monitor Notes (Sept. 7, 2021); Monitor Notes (Sept. 10, 2021); Monitor Notes (Sept. 23, 2021).

¹⁷⁰ Defense counsel requested recusal for the first time on August 6, 2021. The court rejected this petition because “no data ha[d] been established to explain the judge’s direct or indirect interest” and stated that defendants could continue to “enter [their] objections into the electronic record of the court session.” Again, on September 10, 2021, the defense lawyers moved to remove the judge from the case, arguing that he was “indirectly interested in the outcome of the case,” that he had a “special attitude towards the criminal prosecution authorities,” and that he had failed to adequately review the evidence, noting that “it seems he is not even familiar with our case and gets acquainted with it during trial.” The court rejected the motion, stating that “[t]hese circumstances, referring to lack of confidence in the judge, can be indicated in the appeal.” On September 23, 2021, the defense again argued that because the trial was “not objective and impartial, and that [the judge has] an interest in the outcome of the case,” the judge should be removed from the case. For a third time, the court refused the defense motion for recusal. Defense counsel stated that, in total, there were five motions for the judge’s recusal throughout the trial, although TrialWatch only directly observed three such oral motions.

Judgment

On October 11, 2021, the court convicted Mr. Zheksebaev of organizing and participating in the activities of a banned extremist organization under Articles 405(1) and (2) of the Criminal Code.¹⁷¹ He was sentenced to “imprisonment for a period of 5 (five) years with deprivation of the right to engage in social and political activities using the media and telecommunication networks for a period of 5 (five) years.”¹⁷²

In so ruling, the judgment heavily relies on Expert Conclusions introduced by the prosecution, including the three mentioned above, which are described as “confirm[ing] that from a thematic point of view, the conversations under study are united by a common theme and are aimed at informing about the activities of the ‘Koshe Party’ movement, the purpose of which is to call for actions aimed at changing the government.”¹⁷³

As noted above, in order to resolve the aforementioned issue of timing, the prosecution had argued that the Koshe Party was an extension of the DCK and that, “in order to continue the extremist activities of the unregistered movement ‘DCK,’” Mr. Zheksebaev, “together with his associates and leaders of the ‘DCK’... took measures to change the name and transform it to ‘Koshe Partiyasy.”¹⁷⁴ The judgment adopts this theory wholesale, finding that “all defendants were adherents of the ideas promoted by the DCK movement ... [and] in order to continue the illegal activities of ‘DCK,’ Mr. Zheksebaev [and other defendants] took measures to change its name and transform it into “Koshe Party.”¹⁷⁵ The court does not address defense counsel’s arguments that DCK and Koshe were substantively different parties and that, in any event, mounting a defense necessitated access to the decision banning Koshe, stating merely that the defense could have read the prosecutor’s office’s press release about the decision. Indeed, there is no analysis regarding the successor theory at all beyond the above conclusory statement.

Notably, absent this theory of successorship – that the Koshe Party was, in fact, a continuation of the DCK – all but one of the specific instances of conduct alleged in the indictment (the house construction and surrounding conversations that took place on July 19, 2020 in Nur-Sultan) and subsequently referenced in the judgment would have been legal because they occurred before the date when the Yesil court decision banning the Koshe Party went into effect (June 26, 2020).

Suspension of Sentence & Appeal

According to Mr. Zheksebaev’s counsel, in January 2022, Mr. Zheksebaev filed a request with an Almaty court to replace his prison sentence with a suspended sentence. On April

¹⁷¹ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Criminal Indictment (July 2, 2021).

¹⁷⁵ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

15 2022, a court granted Mr. Zheksebaev's petition for a suspended sentence, and in May he was released from prison.¹⁷⁶ Mr. Zheksebaev's counsel reports that the conditions of the suspended sentence require Mr. Zheksebaev to stay within the Almaty city limits and to check in with the police every 15 days. Further, Mr. Zheksebaev's bank accounts have been frozen due to his placement on a list of individuals convicted under Article 405.¹⁷⁷

Mr. Zheksebaev's appeal in the first instance was rejected and he has now filed an appeal before the Supreme Court of Kazakhstan, which is expected to issue a decision in December.

¹⁷⁶ Manshuk Asautai, *Civil activist Askhat Zheksebaev released from prison in Zarechny*, RADIO AZATTYQ (May 3, 2022), <https://rus.azattyq.org/a/31831718.html>.

¹⁷⁷ As of September 2022, Mr. Zheksebaev remains on the list. *List of organizations and persons involved in the financing of terrorism and extremism*, FIN. MONITORING AGENCY (Sept. 1, 2022), <https://afmrk.gov.kz/ru/the-list-of-organizations-and-individuals-associa/perechen-organizaczi-i-licz,-svyazannyix-s-finan/current.html>.

METHODOLOGY



A. THE MONITORING PHASE

The Clooney Foundation for Justice’s (“CFJ”) TrialWatch initiative deployed a monitor to observe the trial of Mr. Zheksebaev before the Almalinskiy District Court of the city of Almaty. 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 July 27, 2021 and concluded with Mr. Zheksebaev’s conviction on October 11, 2021 (hearings on July 27, August 6, August 17, August 19, August 20, August 24, September 2, September 7, September 10, September 16, September 17, September 22, September 23, October 6, October 7, and October 8, 2021).

B. THE ASSESSMENT PHASE

To evaluate the trial’s fairness and arrive at a grade, TrialWatch Expert Stephanie Farrior reviewed an unofficial translation of the indictment and trial judgment, and an analysis of the case and analysis of the political and legal context in Kazakhstan prepared by TrialWatch staff.

Ms. Farrior concluded that the criminal proceedings against Mr. Zheksebaev evinced an alarming disregard for international fair trial standards and for the rights to freedom of expression, peaceful assembly and association. The arrest itself violated the right not to be subjected to arbitrary arrest or detention, as it punished Mr. Zheksebaev for peacefully expressing his views and associating with others – a legitimate exercise of rights protected by the International Covenant on Civil and Political Rights (ICCPR). Moreover, the “anti-extremism” law under which Mr. Zheksebaev was charged is so vague and broadly worded that the UN Human Rights Committee and a UN Special Rapporteur have expressed grave concerns about how it restricts human rights.

The conduct of Mr. Zheksebaev’s trial showed contempt for international fair trial rights. Shockingly, the government would not even let Mr. Zheksebaev see a copy of the court judgment it said banned the organization in which he was active, depriving him of the right to adequate time and facilities to prepare a defense. The court also refused to allow him to examine the witnesses against him, violating the bedrock fair trial right to confront and cross-examine witnesses, and leaving the prosecution’s witnesses unchallenged and untested. The court did not even pretend to give meaningful review of the written evidence submitted, purportedly reviewing 78 volumes – of 170 pages per volume – in just a few hours. The foregoing actions by the court strongly suggest the trial was not conducted by an independent and impartial tribunal, thereby violating yet another right in the ICCPR. In addition, because most of the political activities with which Mr. Zheksebaev

was charged did not become illegal until the secret court decision banning the relevant political party took legal effect, criminally prosecuting him for those activities violated the prohibition on retroactive application of laws.

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. PRETRIAL 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.”¹⁷⁸ Not only should detention be the exception and be as short as possible, but also detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”¹⁷⁹ This means that detention is only appropriate for a limited number of purposes: namely, to prevent flight, interference with evidence, and the recurrence of crime.¹⁸⁰

In evaluating the reasonableness and necessity of detention, courts must undertake an “individualized determination” of the accused’s particular circumstances.¹⁸¹ “Vague and expansive [justifications] such as ‘public security’” fail to meet this standard.¹⁸² Reference

¹⁷⁸ U.N. Human Rights Comm., *İsmet Özçelik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, ¶ 9.3 (Sept. 23, 2019).

¹⁷⁹ U.N. Human Rights Comm., *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, ¶ 7.10 (Dec. 4, 2012).

¹⁸⁰ U.N. Human Rights Comm., *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, ¶ 10.4 (Aug. 19, 2010).

¹⁸¹ See U.N. Human Rights Comm., General Comment No. 35, U.N. Doc. CCPR/C/GC/35, ¶ 38 (Dec. 16, 2014). See also U.N. Human Rights Comm., *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, ¶ 7.10 (Dec. 4, 2012); U.N. Human Rights Comm., *Van Alphen v. the Netherlands*, U.N. Doc. CCPR/C/39/D/305/1988, ¶ 5.8 (July 23, 1990); U.N. Human Rights Comm., *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, ¶ 10.4 (July 16, 2010); U.N. Human Rights Comm., *Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991, ¶ 9.8 (Aug. 10, 1994).

¹⁸² U.N. Human Rights Comm., General Comment No. 35, U.N. Doc. CCPR/C/GC/35, ¶ 38 (Dec. 16, 2014).

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.”¹⁸³

Courts must additionally examine whether non-custodial alternatives, such as bail and monitoring devices, “would render detention unnecessary in the particular case.”¹⁸⁴ If exceptional circumstances exist that permit the imposition of detention, the accused is entitled to periodic review of whether detention is still necessary.¹⁸⁵ A judge “must order release” of an accused “[i]f there is no lawful basis for continuing the detention.”¹⁸⁶

In the recent case of *Umbetaliyev v. Kazakhstan*, the UN Working Group on Arbitrary Detention found that if the government does “not explain the threat posed by the conduct” of claimants “to the legitimate interests that States might invoke ... namely respect for the rights, freedoms or reputations of others, national security, public safety, public order, [and] public health or morals,” “the arrest, trial and subsequent detention ... is consequently arbitrary.”¹⁸⁷

No Legitimate Objective

Mr. Zheksebaev was arrested and placed in pretrial detention on August 22, 2020.¹⁸⁸ Under Kazakh law, a court decides on pretrial detention based on a prosecutor’s motion, which is in turn based on reports from the investigator.

TrialWatch did not have access to the underlying detention orders and the following is based on media reporting. On August 23, 2020, a court in Almaty reportedly imposed detention on the suspicion that the Mr. Zheksebaev was participating in a “banned organization.”¹⁸⁹ On October 14, 2020, Mr. Zheksebaev’s detention was extended for an additional two months, with the stated justification that investigators needed to “inspect [the activists’] confiscated phones and computers.”¹⁹⁰ On December 15, the court again extended Mr. Zheksebaev’s detention, reportedly on the suspicion that he was involved in “creating an extremist group.”¹⁹¹ On January 20, 2021, the court extended Mr.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* ¶ 36.

¹⁸⁷ U.N. Working Group on Arbitrary Detention, Opinion No. 33/2021 Concerning Azamat Umbetaliyev, Beket Mynbasov, Samat Adilov, Zhuldzyzbek Taurbekov, Zhasulan Iskakov, Nazim Abdrakhmanov, Ernar Samatov and Bolatbek Nurgaliyev (Kazakhstan), U.N. Doc. A/HRC/WGAD/2021/33), ¶¶ 69–70 (Oct. 14, 2021).

¹⁸⁸ Criminal Indictment (July 2, 2021).

¹⁸⁹ *Court in Kazakhstan extends arrest of four untried activists for another month*, CENT. ASIAN (Jan. 20, 2021), <https://www.centralasian.org/a/31055862.html>.

¹⁹⁰ *Id.*; *The detention of activists detained in connection with the ‘street party’ has been extended*, CENT. ASIAN (Oct. 15, 2020), <https://www.centralasian.org/a/30894440.html>.

¹⁹¹ *Detention of 4 activists extended in Kazakhstan*, CENT. ASIAN (Dec. 15, 2020), <https://www.centralasian.org/a/31002359.html>.

Zheksebaev's detention for another month on the grounds that the detention was necessary to complete investigations.¹⁹² Further extension orders followed. As a result, Mr. Zheksebaev spent almost a year in detention pending trial.

As noted above, legitimate grounds for detaining an individual are risk of flight, risk of further commission of crime, and risk of interference with the evidence. The imposition of detention, including the extension of detention, must be necessary to achieve one of these objectives. In Mr. Zheksebaev's case, however, the relevant court orders were reportedly based on the nature of the charge and the need for additional investigation. These would not qualify as legitimate objectives for continued detention.

As such, based on the conduct reported, Mr. Zheksebaev's pretrial detention in a maximum-security prison for nearly a year, from August 22, 2020 to July 27, 2021, violated Article 9 of the ICCPR.

Deprivation of Liberty for Legitimate Exercise of Rights

The UN Human Rights Committee has stated 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).”¹⁹³ The UN Working Group on Arbitrary Detention likewise deems 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” as arbitrary.¹⁹⁴ 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.”¹⁹⁵

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

¹⁹² *An Almaty investigative court has extended the detention of four activists*, CENT. ASIAN (Jan. 21, 2021), <https://www.centralasian.org/a/31056015.html>.

¹⁹³ U.N. Human Rights Comm., General Comment No. 35, U.N. Doc. CCPR/C/GC/35, ¶¶ 17, 53 (Dec. 16, 2014).

¹⁹⁴ U.N. Working Group on Arbitrary Detention, Revised Fact Sheet No. 26, (Feb. 8, 2019), <https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf>.

¹⁹⁵ U.N. Working Group on Arbitrary Detention, Opinion No.33/2021 Concerning Azamat Umbetaliyev, Beket Mynbasov, Samat Adilov, Zhuldyzbek Taurbekov, Zhasulan Iskakov, Nazim Abdrakhmanov, Ernar Samatov and Bolatbek Nurgaliyev (Kazakhstan), U.N. Doc. A/HRC/WGAD/2021/33, ¶ 60 (Oct. 14, 2021); see also U.N. Working Group on Arbitrary Detention, Opinion No. 43/20 Concerning Serikzhan Bilash (Kazakhstan), U.N. Doc. A/HRC/WGAD/2020/43, ¶ 59 (Dec. 14, 2020).

expression, including open criticism of the then-President in a speech uploaded to YouTube.¹⁹⁶

Likewise, Mr. Zheksebaev's deprivation of liberty was based on his exercise of protected rights – the right to freedom of expression, right to freedom of peaceful assembly, and right to freedom of association – under the ICCPR. The acts for which Mr. Zheksebaev was charged in the indictment constituted exclusively non-violent political speech, including the promoting of Koshe and the organizing of Koshe rallies. The indictment claims, for example, that Mr. Zheksebaev's social media posts and messages "appeal[ed] to ... feelings of social justice, deliberately, persistently and tendentiously propos[ing] to join and unite in the ranks of the 'Koshe Party,' expressing dissatisfaction with the socio-political situation in the country, a negative assessment of the current government, law enforcement agencies, with a call to take actions aimed at a change of power, resignation of the Government."¹⁹⁷ Nowhere is it alleged that Mr. Zheksebaev encouraged or took part in violence. Indeed, the Expert Conclusions explicitly found, and the prosecution and court acknowledged, that Mr. Zheksebaev did *not* issue a violent call to action. As will be discussed at further length below, speech that engenders criticism of and protest against the government is protected.

Thus, Mr. Zheksebaev's arrest and detention appear to have been based on his exercise of the rights to freedom of expression, freedom of peaceful assembly, and freedom of association.¹⁹⁸ This rendered Mr. Zheksebaev's deprivation of liberty arbitrary, in violation of Article 9 of the ICCPR.

Unlawful Detention

The UN Human Rights Committee has stated that under Article 9 of the ICCPR:

Any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. Deprivation of liberty without such legal authorization is unlawful.¹⁹⁹

The UN Working Group on Arbitrary Detention has likewise stated that "the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law and regulate his or her conduct accordingly." According to the Working Group:

¹⁹⁶ U.N. Working Group on Arbitrary Detention, Opinion No. 5/2021 Concerning Erzhan Elshibayev (Kazakhstan), U.N. Doc. A/HRC/WGAD/2021/5, ¶¶ 4, 5, 60 (May 12, 2021).

¹⁹⁷ Criminal Indictment (July 2, 2021).

¹⁹⁸ *Infra* at § D, "Other Fairness Concerns."

¹⁹⁹ U.N. Human Rights Comm., General Comment No. 35, U.N. Doc. CCPR/C/GC/35, ¶ 22 (Dec. 16, 2014).

[V]aguely and broadly worded provisions, which cannot qualify as *lex certa*, could be used to deprive individuals of their liberty without a specific legal basis, in violation of the due process of law upheld by the principle of legality.²⁰⁰

Articles 405(1) and 405(2) are overly vague, rendering Mr. Zheksebaev's deprivation of liberty on the basis of these provisions unlawful. As discussed above, Article 405(1) criminalizes the "organization of activities of a public or religious association or other organization, concerning which there is an enforceable court decision to ban their activities or liquidate them in connection with the implementation of extremism or terrorism." Article 405(2) criminalizes "[p]articipation in the activities of a public or religious association or other organization, concerning which there is an enforceable court decision to ban their activities or liquidate them in connection with the implementation of extremism or terrorism."

There is, however, no definition of or limiting principles applied to the terms "[o]rganization," "participation," and "activities," leaving their meaning uncertain. Could "[o]rganization" mean sending Telegram messages to other activists, or must it involve active solicitation of new members? Should a mere expression of support, such as wearing the symbol of the organization, or standing in front of an organization's flag, constitute "participation"? The meaning of "activities" is correspondingly vague; "activities" could be events formally organized by the banned party, spontaneous and informal gatherings, or discussions about the party over social media or messaging platforms. The numerous ambiguities in the articles make them susceptible to "overly broad or arbitrary interpretation or application."

Meanwhile, Kazakhstan's 2005 anti-extremism legislation defines extremism as:

[A]ctions of individuals and (or) legal entities ... following extremist purposes ... : forcible change of the constitutional system, violation of the sovereignty of the Republic of Kazakhstan, integrity, inviolability and inalienability of its territory, disruption of national security and defense capacity of the state, forcible seizure of power or forcible retention of power, creation, management and participation in the illegal paramilitary forces, organization of armed rebellion and participation in it, incitement of social ... strife (political extremism)...²⁰¹

A wide range of acts are covered by the term "extremism" – among other things, acts that potentially contravene Kazakhstan's sovereignty or integrity; that undermine its security; and that incite strife – and none of the terms are defined. This makes it difficult for an

²⁰⁰ U.N. Working Group on Arbitrary Detention, Opinion No. 43/20 Concerning Serikzhan Bilash(Kazakhstan), U.N. Doc. A/HRC/WGAD/2020/43, ¶ 66 (Dec. 14, 2020).

²⁰¹ Law on Countering Extremism, art. 1, https://adilet.zan.kz/eng/docs/Z050000031_.

individual or organization to ensure that they avoid violating the 2005 anti-extremism legislation, another layer of vagueness underlying the aforementioned problems with Article 405(1) and (2) of the Kazakh Criminal Code. As noted above, various UN bodies have raised concerns about the “the broad formulation of the concepts of ‘extremism’... under [Kazakhstan’s] criminal legislation and the use of such legislation on extremism to unduly restrict freedoms of religion, expression, assembly and association.”²⁰²

Given that Mr. Zheksebaev was detained on the basis of the vaguely-worded Articles 405(1) and 405(2), his deprivation of liberty was not “prescribed by law” and therefore was unlawful.

C. VIOLATIONS AT TRIAL

Right to Adequate Facilities to Prepare a Defense

Under Article 14(3)(b) of the ICCPR, accused persons must have adequate time and facilities for the preparation of their defense. The UN Human Rights Committee has explained that “adequate facilities” entails access to documents and other evidence, including “all materials that the prosecution plans to offer in court against the accused or that are exculpatory.”²⁰³ The Committee has defined “exculpatory materials” not only as evidence demonstrating an accused’s innocence but also as evidence that “could assist the defence.”²⁰⁴ Restricted disclosure is justified in limited circumstances, such as where necessary for national security or public safety.

In the case of *Khoroshenko v. Russia*, for example, the Committee found that the complainant “did not receive [a] copy of the trial’s records immediately after the first instance verdict was issued [and] that despite numerous requests, he was not given some documents he considered relevant for his defence.”²⁰⁵ The Committee concluded that this conduct violated Article 14(3)(b).

In Mr. Zheksebaev’s case, the prosecution refused to provide the defense with the Yesil court decisions banning the DCK and Koshe Party. Despite numerous requests from the defense over the course of the trial the prosecution continued to withhold the decisions, and the court declined to order the prosecution to share them, telling the defense to “please ... not interrupt the process,” and concluding that the issue of the decisions had already “been discussed in previous court hearings.”²⁰⁶ This was particularly egregious

²⁰² U.N. Human Rights Comm., Concluding Observations on the second periodic report of Kazakhstan, U.N. Doc. A/HRC/43/46/Add.1, ¶ 13 (Aug. 9, 2016).

²⁰³ U.N. Human Rights Comm., General Comment No. 32, U.N. Doc. CCPR/C/GC/32, ¶ 33 (Aug. 23, 2007) (internal citations omitted).

²⁰⁴ *Id.*

²⁰⁵ U.N. Human Rights Comm., *Khoroshenko v. Russian Federation*, U.N. Doc. CCPR/C/101/D/1304/2004, ¶ 9.7 (Apr. 29, 2011).

²⁰⁶ Monitor Notes (Sept. 23, 2021).

because the core of the prosecution's case – that the Koshe Party was a successor of DCK and that Mr. Zheksebaev's alleged acts before the decision banning the Koshe Party came into force were thereby criminal – relied on findings in the decision banning the Koshe Party: per the indictment, "this fact of changing the name of 'DCK' to 'Koshe Party' was established by the Yesil District Court of Nur-Sultan city on 05.19.2020."²⁰⁷ Neither the prosecution nor court invoked national security or public safety grounds for denying the defense access to the decision. As such, the conduct of the prosecutor and court violated Mr. Zheksebaev's right to adequate facilities, guaranteed by Article 14(3)(b) of the ICCPR.

Right to Call and Examine Witnesses

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."²⁰⁸ The UN Human Rights Committee has found violations of Article 14(1) where courts have inexplicably denied requests to summon witnesses.²⁰⁹ As an application of the equality of arms principle, Article 14(3)(e) of the ICCPR enshrines the 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."²¹⁰ Article 14(3)(e) does not establish an absolute right to call and examine witnesses but a right to call witnesses who are relevant,²¹¹ if proposed in a timely manner in compliance with procedural requirements.²¹²

In *Allaberdiev v. Uzbekistan*, the Committee considered a case in which the accused was charged with and convicted of drug-related offenses.²¹³ Defense counsel requested to call, among others, individuals involved with the investigation and individuals who had

²⁰⁷ Criminal Indictment (July 2, 2021).

²⁰⁸ U.N. Human Rights Comm., General Comment No. 32, U.N. Doc. CCPR/C/GC/32, ¶ 13 (Aug. 23, 2007).

²⁰⁹ See U.N. Human Rights Comm., *Evrezov et al. v. Belarus*, U.N. Doc. CCPR/C/112/D/1999/2010, ¶ 8.9 (Nov. 25, 2014); U.N. Human Rights Comm., *Khomidova v. Tajikistan*, U.N. Doc. CCPR/C/81/D/1117/2002, ¶ 6.5 (July 29, 2004).

²¹⁰ U.N. Human Rights Comm., General Comment No. 32, U.N. Doc. CCPR/C/GC/32, ¶ 39 (Aug. 23, 2007).

²¹¹ U.N. Human Rights Comm., *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, ¶ 9.6 (Sept. 20, 2018).

²¹² U.N. Human Rights Comm., *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, ¶ 6.5 (Mar. 27, 2006); U.N. Human Rights Comm., General Comment No. 32, U.N. Doc. CCPR/C/GC/32, ¶ 39 (Aug. 23, 2007).

²¹³ U.N. Human Rights Comm., *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, ¶¶ 2.1–2.21 (May 18, 2017).

allegedly planted the drugs on the accused.²¹⁴ Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.²¹⁵ The Committee found a breach of Article 14(3)(e).²¹⁶ 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.²¹⁷ Notably, the right to call and examine witnesses encompasses experts²¹⁸ as well as police officers involved in the investigation.²¹⁹

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,²²⁰ but also where courts have unjustifiably cut short defense cross-examination of prosecution witnesses,²²¹ and where the prosecution has introduced out-of-court statements by key witnesses without making those witnesses available for cross-examination by the defense.²²² As stated by the Committee, the defense should be “given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.”²²³

In the present case, the court denied defense counsel’s repeated requests to call relevant witnesses without adequate justification. During the court session on September 23, 2021, Mr. Zheksebaev’s lawyer called for cross-examination of the individuals who authored the Expert Conclusions so that they could “explain how they came to such

²¹⁴ *Id.* ¶ 3.5.

²¹⁵ *Id.* ¶¶ 8.7–8.9.

²¹⁶ *Id.* ¶¶ 8.8–8.9.

²¹⁷ U.N. Human Rights Comm., *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, ¶ 9.6 (Sept. 20, 2018).

²¹⁸ See U.N. Human Rights Comm., *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, ¶ 8.4 (May 10, 2010).

²¹⁹ See European Court of Human Rights, *Butkevich v. Russia*, App. No. 5865/07, ¶ 98 (Feb. 13, 2018); European Court of Human Rights, *Ürek and Ürek v. Turkey*, App. No. 74845/12, ¶ 50 (July 30, 2019).

²²⁰ See U.N. Human Rights Comm., *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, ¶ 8.9 (Mar. 21, 2017); U.N. Human Rights Comm., *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, ¶ 9.9 (May 13, 2016); U.N. Human Rights Comm., *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, ¶ 7.7 (July 24, 2006); U.N. Human Rights Comm., *Dugin v. Russian Federation*, U.N. Doc. CCPR/C/81/D/815/1998, ¶ 9.3 (July 5, 2004); U.N. Human Rights Comm., *Khomidova v. Tajikistan*, U.N. Doc. CCPR/C/81/D/1117/2002, ¶ 6.5 (July 29, 2004).

²²¹ U.N. Human Rights Comm., *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, ¶ 7.7 (July 24, 2006); see also European Court of Human Rights, *Pichugin v. Russia*, App. No. 38623/03, ¶ 172 (Oct. 23, 2012), (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).

²²² See U.N. Human Rights Comm., *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, ¶ 9.9 (May 13, 2016); U.N. Human Rights Comm., *Rouse v. Philippines*, U.N. Doc. CCPR/C/84/D/1089/2002, ¶ 7.5 (July 25, 2005); U.N. Human Rights Comm., *Dugin v. Russian Federation*, U.N. Doc. CCPR/C/81/D/815/1998, ¶ 9.3 (July 5, 2004).

²²³ U.N. Human Rights Comm., *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, ¶ 9.9 (May 13, 2016).

conclusions.”²²⁴ Another defense lawyer supported Mr. Zheksebaev’s petition, saying that “[he] would also like to solicit the summoning of these experts to clarify the conclusions.”²²⁵ In response, the judge denied the request on the basis that, as argued by the prosecutor, “the interrogations of experts ... are also attached to the [case] materials” and that the experts thus did not need to be called as witnesses.²²⁶

Questioning of the authors of the Expert Conclusions, however, was key to the defense’s ability to challenge the prosecution’s case. The prosecution heavily relied on Expert Conclusions Nos. 4337 and 6315 to argue that Mr. Zheksebaev organized and participated in the activities of a banned extremist organization. In the indictment, for example, the prosecution used Expert Conclusion No. 4337 to support the allegation that Mr. Zheksebaev was “encouraging people to join the Koshe Party movement, to participate in protest actions, and to change the government.”²²⁷ Similarly, the prosecution used Expert Conclusion No. 6315 to argue that Mr. Zheksebaev encouraged a “negative, critical attitude towards the existing government in the Republic of Kazakhstan,” which was “aimed at encouraging people to participate in rallies and protests.”²²⁸

At trial, prosecution witness Investigator Kazhibayev testified that the evidence that Mr. Zheksebaev organized and participated in the activities of a banned extremist organization was contained in “an expert opinion.”²²⁹ The prosecutor also relied on an Expert Conclusion when cross-examining Mr. Zheksebaev about the construction project and whether he was “attracting new people to the Koshe Party.”²³⁰ It was thus essential that the defense be allowed to question the authors of the Expert Conclusions about their methodology, experience, and conclusions.

Meanwhile, the judgment describes the Expert Conclusions, untested by the defense, as “confirm[ing] that from a thematic point of view, the conversations under study are united by a common theme and are aimed at informing about the activities of the ‘Koshe Party’ movement, the purpose of which is to call for actions aimed at changing the government.”²³¹

That the Expert Conclusions were available in written form did not obviate the need for cross-examination. As the UN Human Rights Committee has established, the defense must be “given a proper opportunity to question and challenge witnesses against them at

²²⁴ Monitor Notes (Sept. 23, 2021).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Criminal Indictment (July 2, 2021).

²²⁸ *Id.*

²²⁹ Monitor Notes (Aug. 24, 2021).

²³⁰ Monitor Notes (Aug. 17, 2021).

²³¹ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

some stage of the proceedings.”²³² In this case, the defense had no such opportunity. Consequently, the court’s refusal to summon relevant witnesses violated Article 14(3)(e).

Right to an Impartial Tribunal

The conduct of the proceedings raises concerns about the impartiality of the tribunal. Among other things, the court’s rulings against defense counsel, as well as the manifestly arbitrary judgment, suggest that the court was not impartial.

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, must not harbor preconceptions about the particular case before them, and must not act in ways that improperly promote the interests of one of the parties to the detriment of the other.²³³ Second, the tribunal must also appear to a reasonable observer to be impartial.²³⁴

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 Article 14(1) violation due to rulings that hindered the preparation of an effective defense, such as “ignor[ing] [counsel’s] objections” and “refus[ing] to allow the possibility for the author to adduce relevant evidence.”²³⁵ Similarly, in *Toshev v. Tajikistan*, the Committee concluded that the court lacked impartiality where “several of the lawyers’ requests were not given due consideration.”²³⁶

A number of features of the trial of Mr. Zheksebaev would give a reasonable observer grounds for doubting the court’s impartiality.

First, as discussed above, the court refused to order the prosecution to provide the defense with access to the court decisions banning the DCK and Koshe, which lay at the core of the prosecution’s case.

Second, as discussed above, the judge refused the defense permission to question the authors of the Expert Conclusions, severely undermining counsel’s ability to mount a defense.

²³² U.N. Human Rights Comm., *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, ¶ 9.9 (May 13, 2016).

²³³ U.N. Human Rights Comm., General Comment No. 32, U.N. Doc. CCPR/C/GC/32, ¶ 21 (Aug. 23, 2007).

²³⁴ *Id.*

²³⁵ U.N. Human Rights Comm., *Khostikoev v. Tajikistan*, U.N. Doc. CCPR/C/97/D/1519/2006, ¶¶ 7.2–7.3 (Dec. 3, 2009).

²³⁶ U.N. Human Rights Comm., *Toshev v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006, ¶ 6.6 (Apr. 28, 2011).

Third, under Kazakh criminal procedure, the court reviews written evidence during trial proceedings. In Mr. Zheksebaev’s case, the court appeared to conduct this review far too rapidly to fairly consider the substance of the evidence. Namely, the court reviewed 78 volumes of evidence from the criminal trial in just a few hours, spending just minutes on each 170-page volume.²³⁷

Fourth, as will be described at length below, the judgment convicting Mr. Zheksebaev is manifestly arbitrary, suggesting a predetermined outcome. Excepting one instance the specific acts alleged in the indictment as demonstrating Mr. Zheksebaev’s organization of or participation in the activities of the Koshe Party occurred before the ban on the movement went into legal effect, a threshold issue that the court should have seriously evaluated. Instead, the judgment skims over this problem, repeating the prosecution’s contention that “all defendants were adherents of the ideas promoted by the DCK movement ... [and] in order to continue the illegal activities of ‘DCK,’ Mr. Zheksebaev [and other defendants] took measures to change its name and transform it into ‘Koshe Party.’”²³⁸ The court does not address defense counsel’s arguments that DCK and Koshe were substantively different parties and that, in any event, mounting a defense necessitated access to the decision banning Koshe, stating merely that the defense could have read the prosecution’s press release about the decision. Indeed, there is no analysis regarding the successor theory at all beyond the above conclusory statement.

D. OTHER FAIRNESS CONCERNS

Principle of Legality

Mr. Zheksebaev’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.”²³⁹ 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.”²⁴⁰

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” but also “embodies, more generally, the principle that only the law can define a crime and

²³⁷ Monitor Notes (Sept. 7, 2021); Monitor Notes (Sept. 23, 2021).

²³⁸ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

²³⁹ ICCPR, art. 15(1).

²⁴⁰ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, ¶ 185 (May 17, 2010); see also European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, ¶ 52 (May 25, 1993).

prescribe a penalty,” which it must do clearly and precisely.²⁴¹ The law must further be accessible and violations under it foreseeable so as to enable individuals to regulate their conduct accordingly. Correspondingly, a law must “not confer unfettered discretion ... on those charged with its execution.”²⁴² 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.”²⁴³ 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.”²⁴⁴

Reasonable Foreseeability

As discussed above, Articles 405(1) and 405(2), under which Mr. Zheksebaev was charged, prosecuted, and convicted, are insufficiently precise, making it difficult for an individual to understand “what acts and omissions will make him criminally liable” and “confer[ring] unfettered discretion ... on those charged with its execution.” Among other things, it is unclear what would constitute “organization” or “participation,” and what would qualify as the “activities” of a banned organization. Mr. Zheksebaev could not have known from the “wording of [Article 405] ... what acts and omissions [would] make him criminally liable.”²⁴⁵ As such, the criminal proceedings against him violated Article 15(1) of the ICCPR.

Prohibition on Retroactive Application of Laws

Article 405 criminalizes the organization of or participation in the activities of an organization banned by a court decision. Nearly all of the specific instances of conduct listed in the indictment – with the exception of the house construction and related meetings in Nur-Sultan – that allegedly demonstrated Mr. Zheksebaev’s “organization” of and “participation” in the activities of a banned organization occurred *before* the decision banning the Koshe Party went into legal effect.²⁴⁶ These acts were likewise cited in the decision as underlying Mr. Zheksebaev’s conviction.

The prosecution’s theory for why Mr. Zheksebaev’s actions were illegal was that Mr. Zheksebaev and other activists changed the name of the DCK to Koshe Party “in order to continue the extremist activities of the unregistered movement ‘DCK’” and thereby

²⁴¹ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, ¶ 185 (May 17, 2010).

²⁴² U.N. Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34, ¶ 25 (Sept. 12, 2011) (noting that 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).

²⁴³ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, ¶ 185 (May 17, 2010); see also European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, ¶ 52 (May 25, 1993).

²⁴⁴ European Court of Human Rights, *Kononov v. Latvia*, App. No. 36376/04, ¶ 185 (May 17, 2010).

²⁴⁵ *Id.*

²⁴⁶ Criminal Indictment (July 2, 2021).

“conceal criminal activity.”²⁴⁷ The judgment adopts this premise wholesale, finding that “all defendants were adherents of the ideas promoted by the DCK movement ... [and] in order to continue the illegal activities of ‘DCK,’ Mr. Zheksebaev [and other defendants] took measures to change its name and transform it into ‘Koshe Party.’”²⁴⁸

The court fails to address the defense contention that the parties were substantively different and likewise neglects the argument that the decision banning the Koshe Party was unpublished, stating merely that the defendants could have read the prosecution’s press release on the decision (presumably referring to the press release’s mention of the theory of successorship adopted in the decision). In any event, many of the specific acts cited in the indictment occurred prior to the decision and corresponding press release (and all save one occurred before the decision went into legal effect), meaning that Mr. Zheksebaev and others would not have known about such a legal theory at the time of the alleged acts.

The above was not sufficient to find Mr. Zheksebaev guilty of acts that were apparently not criminal at the time of commission according to the plain wording of Article 405. As such, Mr. Zheksebaev’s conviction violated Article 15(1) of the ICCPR.

Right to Freedom of Expression

Mr. Zheksebaev’s prosecution and conviction violated his 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.”²⁴⁹

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.”²⁵⁰ 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.”²⁵¹

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

²⁴⁷ *Id.*

²⁴⁸ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

²⁴⁹ U.N. Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34, ¶ 11 (Sept. 12, 2011).

²⁵⁰ *Id.* ¶ 13.

²⁵¹ *Id.* ¶ 38.

to that objective.²⁵² 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.²⁵³ 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.”²⁵⁴

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.”²⁵⁵ 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.”²⁵⁶ 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.²⁵⁷

In accordance with the above standards, the proceedings against Mr. Zheksebaev violated his right to freedom of expression. The judgment finds Mr. Zheksebaev guilty on the basis of his social media posts, where, among other things, he “demanded the release of ‘political’ prisoners” and encouraged people “throughout the republic [of Kazakhstan]” to “understand[] [the Koshe Party’s] purpose,” and for private messages with other Koshe Party members in which he discussed Koshe Party activities and upcoming rallies (the planning of rallies will be covered below in the section on freedom of assembly).²⁵⁸

Mr. Zheksebaev’s social media posts and messages thus constituted “criticism and political opposition”²⁵⁹ and were situated within a broader public dialogue. As established

²⁵² See U.N. Human Rights Comm., *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, ¶ 12.2 (Jan. 4, 1999); see also U.N. Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34, ¶ 34 (Sept. 12, 2011).

²⁵³ U.N. Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34, ¶ 21 (Sept. 12, 2011).

²⁵⁴ *Id.* ¶ 35.

²⁵⁵ *Id.* ¶ 33.

²⁵⁶ *Id.* ¶ 34.

²⁵⁷ 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, ¶ 81 (Aug. 10, 2011); 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, ¶ 38 (Apr. 29, 2016); Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39, Principle 7 (Oct. 1, 1995).

²⁵⁸ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

²⁵⁹ U.N. Human Rights Comm., General Comment No. 34, U.N. Doc. CCPR/C/GC/34, ¶ 38 (Sept. 12, 2011).

by the UN Human Rights Committee, this form of engagement with current events warrants heightened protection. Consequently, the limitation imposed – Mr. Zheksebaev’s criminal prosecution, conviction and sentencing – was unlawful unless it complied with the three-part test delineated by the UN Human Rights Committee.

Mr. Zheksebaev’s prosecution, conviction, and sentencing does not pass this test. As a threshold matter, the proceedings against Mr. Zheksebaev failed to meet the requirement of legality. As discussed above, Articles 405(1) and 405(2) are impermissibly vague, making it difficult for individuals to understand what acts are prohibited and affording the authorities excessive discretion.

Second, the imposition of 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.”²⁶⁰ Even assuming that Mr. Zheksebaev’s prosecution was designed to protect 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 court’s judgment relied heavily on the theory that Mr. Zheksebaev’s social media posts and Telegram messages were designed to “overthrow ... the current government.”²⁶¹ Nowhere, however, is the threat of violent regime change further explained or supported with evidence, and nowhere is a “direct and immediate connection” between Mr. Zheksebaev’s speech and this threat established. The judgment cites as proof of Mr. Zheksebaev’s guilt Expert Conclusions that his conversations as analyzed were:

[U]nited by a common theme and are aimed at informing about the activities of the “Koshe Party” movement, the purpose of which is to establish a Parliamentary Republic in the country, encouragement to join and unite in its ranks, an expression of dissatisfaction with the socio-political situation in the country, a negative assessment of the current government, law enforcement agencies, a call to take actions aimed at changing the government, as well as the resignation of the Government.²⁶²

The objectives of changing the government, exposing problems that reflect a “negative assessment” of the ruling party, and encouraging opposition can be found in the mission statements of many civil society organizations. The indictment and judgment do not cite any specific instance of Mr. Zheksebaev calling for violence or even any instance in which Mr. Zheksebaev’s words might be implicitly understood to be referring to violence. Indeed,

²⁶⁰ *Id.* ¶ 35.

²⁶¹ Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

²⁶² *Id.*

both reference Expert Conclusion 6315's finding that Mr. Zheksebaev did not engage in acts aimed at a violent seizure of power. Without identification of a concrete threat beyond routine political activism, the proceedings against Mr. Zheksebaev fall short of Article 19 standards on legitimate objective.

Third, with respect to necessity and proportionality requirements, the institution of criminal proceedings and imposition of a five-year sentence 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, according to the prosecution's press release on the Yesil court's decision banning Koshe, the court described the main goals of DCK and Koshe as "incit[ing] social hatred [and] the violent seizure of power and changes in the constitutional order of the Republic of Kazakhstan," in this case the prosecution did not allege and the court did not find that Mr. Zheksebaev's acts qualified as incitement to violence or hatred.

Fourth, the court's conviction of Mr. Zheksebaev included "deprivation of the right to engage in social and political activities using the media and telecommunication networks for a period of 5 (five) years."²⁶³ This measure impermissibly restricts 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 Mr. Zheksebaev from engaging in *any* political activism for five years, without exception. This ban thus violated – and continues to violate – Mr. Zheksebaev's Article 19 right to freedom of expression.

Right to Freedom of Peaceful Assembly

In addition to violating Mr. Zheksebaev's right to freedom of expression, the proceedings violated his 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."²⁶⁴ 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.²⁶⁵ "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

²⁶³ *Id.*

²⁶⁴ U.N. Human Rights Comm., General Comment No. 37, U.N. Doc. CCPR/C/GC/37, ¶ 4 (July 23, 2020).

²⁶⁵ *Id.* ¶¶ 13-14, 33-34.

level of accommodation and protection.”²⁶⁶ Indeed, authorities are required to enable peaceful protests, including by taking “specific measures” such as “block[ing] off streets [and] redirect[ing] traffic.”²⁶⁷

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.²⁶⁸ 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, and the rights and freedoms of others.²⁶⁹ “This is an exhaustive list.”²⁷⁰ 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 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.²⁷¹

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.”²⁷²

Mr. Zheksebaev was prosecuted and convicted in part for posts and messages in which he discussed and helped prepare for rallies.²⁷³ As noted above, not only direct participation in an assembly but also the organization and facilitation of assemblies is protected by Article 21. Given their political purpose (to promote Koshe), the assemblies in question should have enjoyed “a heightened level of accommodation and

²⁶⁶ *Id.* ¶ 32.

²⁶⁷ *Id.* ¶ 24.

²⁶⁸ ICCPR, art. 21. See also U.N. Human Rights Comm., General Comment No. 37, U.N. Doc. CCPR/C/GC/37, ¶ 36 (July 23, 2020).

²⁶⁹ ICCPR, art. 21.

²⁷⁰ U.N. Human Rights Comm., General Comment No. 37, U.N. Doc. CCPR/C/GC/37, ¶ 41 (July 23, 2020).

²⁷¹ *Id.* ¶ 44.

²⁷² *Id.* ¶ 16.

²⁷³ Criminal Indictment (July 2, 2021); Almalinskiy District Court of the City of Almaty, Judgment (Oct. 11, 2021).

protection.”²⁷⁴ Further, no evidence was presented to show that the planned rallies ever posed a threat to public safety or order.

Although the authorities had banned the Koshe Party as an extremist organization and although the impending assemblies in question were to be Koshe rallies, as stated by the UN Human Rights Committee “[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.”²⁷⁵ In other words, the criminalization of the Koshe Party 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 any evidence to the contrary in Mr. Zheksebaev’s case, his prosecution and conviction violated Article 21.

Right to 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.”²⁷⁶

Further, as the European Court of Human Rights has explained, 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.²⁷⁷

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.²⁷⁸

In the present case Mr. Zheksebaev was prosecuted and convicted for allegedly organizing and participating in the activities of the banned Koshe Party. As discussed

²⁷⁴ U.N. Human Rights Comm., General Comment No. 37, U.N. Doc. CCPR/C/GC/37, ¶ 32 (July 23, 2020).

²⁷⁵ *Id.* ¶ 16.

²⁷⁶ See U.N. Human Rights Comm., *Pinchuk v. Belarus*, U.N. Doc. CCPR/C/112/D/2165/2012, ¶ 8.4 (Nov. 17, 2014).

²⁷⁷ European Court of Human Rights, *Case of the United Macedonian Organization Ilinden-Pirin and Others v. Bulgaria*, App. No. 59489/00, ¶ 61 (Oct. 20, 2005).

²⁷⁸ *Id.* ¶¶ 61–63.

above, there were serious doubts about whether the charged acts should have been prosecuted under Article 405 given the issue of timing. 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 neither the decision banning the DCK nor the decision banning the Koshe Party has been made public, the European Parliament²⁷⁹ and U.S. State Department²⁸⁰ have characterized the Koshe Party as peaceful. As made clear by the UN 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 the Koshe Party is indeed peaceful, as appears to be the case, and has been prohibited merely for deviating from President Tokayev’s Amanat (formerly Nur-Otan) party agenda, this would violate Article 22, as would Mr. Zheksebaev’s prosecution under Articles 405(1) and (2).

Right to Take Part in Public Affairs

The wholesale ban on Mr. Zheksebaev’s political activities likewise violates his right to participate in public affairs. Article 25 of the ICCPR entitles “every citizen ... without unreasonable restriction ... [t]o take part in the conduct of public affairs, directly or through freely chosen representatives.” As the UN Human Rights Committee has noted, citizens “take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.”²⁸¹ The Human Rights Committee has emphasized that a State may not ban someone from peaceful political activities just because the person’s views do not align with those of the State: “No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of . . . political or other opinion.”²⁸²

Notably, the Human Rights Committee has highlighted the interdependence of the exercise of political rights in Article 25 with the freedoms of opinion, expression, association and peaceful assembly:

In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on

²⁷⁹ European Parliament, *Human Rights Situation in Kazakhstan: Resolution*, Doc. No. 2021/2544(RSP), ¶ 5 (Feb. 10, 2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0056_EN.pdf.

²⁸⁰ *2020 Country Report on Human Rights Practices: Kazakhstan*, U.S. Dep’t of State (Mar. 2021), <https://www.state.gov/wp-content/uploads/2021/10/KAZAKHSTAN-2020-HUMAN-RIGHTS-REPORT.pdf>.

²⁸¹ UN Human Rights Committee, General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7, ¶ 8 (Aug. 27, 1996).

²⁸² *Id.* ¶ 3.

public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.²⁸³

In this regard, the Human Rights Committee has stated in applying Article 25 that “citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.”²⁸⁴ The Committee’s General Comment notes moreover that:

The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process.²⁸⁵

The criminal prosecution of Mr. Zheksebaev for his peaceful political activities without reasonable or objective grounds, along with the subsequent sanctions imposed on him, violated his rights under Article 25.

Right to Equality Before the Law

The rights violations set out above demonstrate that the criminal proceedings against Mr. Zheksebaev also violated his right to equality before the law. Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...political or other opinion.” The term “discrimination” in the Covenant means “any distinction, exclusion, restriction or preference” based on any of the prohibited grounds that has “the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”²⁸⁶ Beyond the specific guarantees in the ICCPR,

²⁸³ *Id.* ¶ 25.

²⁸⁴ UN Human Rights Committee, *Gauthier v. Canada*, U.N. Doc. CCPR/C/65/D/633/1995, ¶ 13.4 (May 5, 1999).

²⁸⁵ UN Human Rights Committee, General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7, ¶ 26 (Aug. 27, 1996).

²⁸⁶ U.N. Human Rights Comm., General Comment No. 18, U.N. Doc. CCPR/C/GC/37, ¶ 7 (Nov. 10, 1989).

Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”²⁸⁷

As established above, in the present case Mr. Zheksebaev was not treated equally before the law because of his political opinion. He was criminally prosecuted solely because of his affiliation with and peaceful expression of support for an opposition political party; the prosecution’s entire case and the court’s judgment rested on Mr. Zheksebaev’s conversations and posts in favor of the party and its activities. This constitutes discrimination under the Covenant, as the restriction of his rights was based on political opinion and it had both the “purpose” and the “effect” of impairing his equal enjoyment and exercise of his rights and freedoms. Consequently, the proceedings violated Mr. Zheksebaev’s right to equality before the law under Article 26 of the ICCPR.

²⁸⁷ *Id.* ¶ 12.

CONCLUSION AND GRADE



When Kazakhstan presented its candidacy for a seat on the UN Human Rights Council in June 2021, it said in its Statement of Voluntary Pledges and Commitments: “Upholding universal human rights has been a priority commitment of Kazakhstan since the inception of its statehood ... Comprehensive national legislation was adopted in keeping with the highest international standards ... Kazakhstan commits to ensuring national compliance with the international instruments it has ratified ... New legal norms further strengthen the values of pluralism of opinions, alternative views, constructive engagement and social responsibility in Kazakhstan.”²⁸⁸

However, actions speak louder than words. As shown by the government’s treatment of Mr. Zheksebaev and other critics of the ruling party in the cases described above, upholding human rights is not a “priority commitment of Kazakhstan.” Its “anti-extremism” legislation is not at all “in keeping with the highest international standards.” Kazakhstan has a long way to go if it is to meet its commitment to “ensuring national compliance with the international human rights instruments it has ratified.” It is admirable that the government sees merit in strengthening “the values of pluralism of opinions [and] alternative views,” but the facts show that it is instead doing its best to crush dissenting opinions and views. Kazakhstan should comply with the human rights treaties it has ratified, uphold the human rights for which it has proclaimed support, and overturn the conviction of Mr. Zheksebaev.

GRADE:



²⁸⁸ U.N. General Assembly, Note Verbale Dated 14 June 2021 from the Permanent Mission of Kazakhstan to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/76/86, ¶¶ 2,5,19 (June 15, 2021).



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,”²⁸⁹ 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

²⁸⁹ ICCPR, Article 26

outcome and/or resulted in significant harm.