

Mandates of the Special Rapporteur on freedom of religion or belief; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on minority issues and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on freedom of religion or belief; Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on minority issues and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 40/10, 42/22, 43/4, 43/8 and 40/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the arrest and detention of Mr. **Shukhrat Kibirov**, on incitement to hatred and terrorism charges.

Mr. Kibirov is 36-year old merchant with disability, member of the Uyghur minority in Kazakhstan, and adherent to the traditional Sunni Hanafi Islam.

According to the information received:

In 2014, an unidentified person using a nickname posted five religious nasheed songs in Arabic language on the social network VKontakte.

An investigator from the National Security Committee claimed that the social network account belonged to Mr. Shukhrat Kibirov, although it was reported that the investigation did not produce tangible evidence supporting that allegation.

In April 2017 Mr. Kibirov was arrested from his home in Almaty and charged with "incitement to social, national, tribal, racial, class or religious discord" (article 174 of the Criminal Code) and "propaganda of terrorism or public calls for commission of terrorism with the use mass media or telecommunications networks" (article 256 of the Criminal Code). Prior to his trial, he was detained at the detention centre of the National Security Committee in Almaty for approximately five months. He had access to his lawyer, but he was allowed to be visited by his relatives only once.

During his trial at the District Court of Almaty, which started on 27 September 2017, the prosecution presented an expert examination of the songs' lyrics, which found that they contained "signs of religious discord", but without substantiating any elements of terrorist propaganda. The judge argued that Mr. Kibirov had knowledge of the Arabic language, and therefore he deliberately posted them online. It is also reported that during the trial the prosecution emphasized the ethnic origin of Mr. Kibirov as a member of the Uyghur

minority of the country.

On 28 November 2017, Mr. Kibirov was sentenced to 6 years and 8 months in prison, and on 19 January 2018, the Almaty City Court heard the appeal and confirmed the sentence imposed at the first instance.

He was transferred to serve his sentence at the penitentiary colony LA-155/14, in Almaty region. In 2019, after having served a third of his sentence, he was eligible for parole, but the prison authorities imposed on him three disciplinary sanctions between May and August 2019, for alleged breaches of discipline such as “appearing without a prisoner’s badge”, and taking a “short rest” during repair works assigned to him. During that time, Mr. Kibirov was also threatened by an agent of the National Security Committee not to apply for parole.

Detention sanctions are often used against prisoners convicted under the extremism and terrorism provisions of the Criminal Code, in order to prevent mitigation of their sentences and subsequently their early release.

On 24 October 2020, Mr. Kibirov was transferred without any explanation to prison colony ES-164/3, a medium security prison located about 2,000 kilometres from Almaty, where his family lives. Due to the remoteness of this new place of detention, his family has not been in a position to visit him since the date of his transfer.

While we do not wish to prejudge the accuracy of information made available to us, we express our concern at the reported judicial harassment suffered by Mr. Shukhrat Kibirov - a member of the Uyghur minority in Kazakhstan - , as well as at his conviction and detention on extremism and terrorism grounds for the alleged publication on social media of religious songs. We are particularly concerned at the reported trial proceedings that appear to fall short of the most basic fair trial standards related to the production of evidence, in conformity with Kazakhstan legal obligations under the International Covenant on civil and political rights (ICCPR) ratified in 2016. From the information available to us, it appears that there is no evidence that Mr. Kibirov is the source of the songs posted on the social media. Instead, it seems that his conviction and lengthy prison sentence were based on the sole examination of the songs’ lyrics, and on a vague expert assessment that they contained “signs of religious discord”.

If this is true, his conviction and imprisonment for the past two years would be in violation of ICCPR’s articles 2, 9, 10, 14, 18, 19, 26, 27, which provide for the right to liberty and security, the right to a fair trial, the right to an effective remedy by a competent tribunal for acts violating citizens’ fundamental rights, the right to freedom of thought, opinion, conscience, religion or belief, the right to freedom of expression, to non-discrimination, and the rights of persons belonging to minorities. The protection of these rights is an obligation of the state of Kazakhstan under that international treaty.

We raise particular concern at what seems to be use of counter-terrorism legislation to arbitrarily restrict fundamental rights and freedoms, such as freedom of expression, religion and belief. These rights are protected under the ICCPR and their exercise cannot be restricted other than in conformity with the Covenant. In this regard, we recall that counter-terrorism legislation should not be used as an excuse to

repress peaceful activities or restrict or deny their fundamental rights to minority groups and their members.

We also raise the concern that the timing of the disciplinary sanctions imposed upon Mr. Kibirov by the penitentiary authorities of Colony LA-155/14 seems to have coincided with the moment when he was eligible for a parole. The reported reasons for these sanctions do not appear to constitute sufficient grounds to refuse Mr. Kibirov's right to parole. This concern is heightened by the alleged pressures that Mr. Kibirov seems to have been subjected to by National Security Committee officers to deny him the exercise of this right.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to my attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above mentioned allegations.
2. Please provide information on the legal and factual grounds of the arrest, detention and conviction of Mr. Shukhrat Kibirov and how these comply with Kazakhstan's obligations under international human rights law.
3. In particular please provide detailed and precise information supporting the attribution of the social media account on which the incriminated songs were posted, to Mr. Kibirov.
4. Please provide detailed information about the songs incriminated. In what way these songs contain "signs of religious discord" and their publication on a social network is of such a nature as to constitute a criminal offence, and how this is compatible with the international obligations of Kazakhstan under ICCPR.
5. Please provide details about the disciplinary sanctions taken against Mr. Shukhrat Kibirov between May and August. What are the sanctions provide for by prison rules and regulations for what appears to be minor breaches of discipline? In what way these breaches of discipline affect Mr. Kibirov's right to apply for parole?
6. Please explain the reasons and legality for Mr. Kibirov's transfer from prison colony LA-155/14 to prison colony ES-164/3, which is located far from Almaty, where Mr. Kibirov's family resides, and explain the measures undertaken to ensure that he has access to his relatives and lawyers.
7. Please explain how Kazakhstan's national security and counter-terrorism legislation and policies are compatible with the protection of all human rights, as provided for under the United Nations Global

Strategy against Terrorism, and related Security Council's resolutions which insist on the necessary compliance of counter-terrorism policies, laws and practices with international legal human rights, including the rights to freedom of expression, freedom of thought, conscience, religion or belief, the right to fair trial, and the rights of persons belonging to ethnic and religious minorities.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We would like to inform your Excellency's Government that after having transmitted a joint communication to the Government, the Working Group on Arbitrary Detention may also transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the present communication and to the regular procedure.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

Ahmed Shaheed
Special Rapporteur on freedom of religion or belief

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Irene Khan
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Fernand de Varennes
Special Rapporteur on minority issues

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation above.

We would like to refer your Excellency's Government to the International Covenant on Civil and Political Rights (ICCPR), ratified by Kazakhstan on 24 January 2006, and in particular articles 2, 9, 10, 14, 18, 19, 26, 27, which provide for the right to liberty and security, the right to an effective remedy by the competent national tribunals for acts violating their fundamental rights, freedom of thought, conscience, religion or belief, freedom of expression, the protection against arbitrary arrest or detention, non-discrimination, and the rights of persons belonging to minorities.

In particular, we refer to article 9 of the ICCPR which guarantees the right to liberty and security of person and establishes in particular that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Article 9 (4) also entitles everyone detained to challenge the legality of such detention before a judicial authority. We recall that this right is applicable to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes (see the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, para. 47(a)).

In its General Comment No 35, the Human Rights Committee has found that arrest 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), freedom of association (art. 22) and freedom of religion (art. 18). In addition, the Committee has stated that arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 of the Covenant is in principle also arbitrary.

We also refer your Excellency's Government to article 14 of the ICCPR, whereby everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. We also recall that according to article 14(2), everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 18 of the ICCPR guarantees the right of freedom of thought, conscience, religion or belief and protects against any coercion which would impair one's freedom to have or to adopt a religion or belief of his choice. We wish also to recall that while the manifestation of religion or belief may be restricted as per Article 18(3) of the ICCPR for the purpose of protecting public safety, order, health, morals and the fundamental rights and freedoms of others, any such limitation must fulfil a

number of obligatory criteria, including being non-discriminatory in intent or effect and constitute the least restrictive measure.

We moreover refer to article 19 of the ICCPR, which guarantees the right of everyone to freedom of opinion and expression, which includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”. The State has the burden to demonstrate that any measures taken to restrict speech, including those expressions which fall within the scope of article Article 20 of the ICCPR are justified. Any such restrictions must be compatible with article 19 (3) of the Covenant. That is, they must be provided by law, pursue one of the exhaustively enumerated legitimate aims, and be necessary and proportionate.

In its General Comment No. 34 on the right to freedom of opinion and expression, the Human Rights Committee has found that restrictions of the right to freedom of opinion and expression that a government seeks to justify on grounds of national security and counter-terrorism should adhere to the principle of proportionality, be designed and implemented in a way that respects the universality of human rights and the principle of non-discrimination, and should not be used to prosecute human rights defenders (CCPR/C/GC/34).

We would like to respectfully remind your Government of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (A/RES/36/55), which in its Article 2 (1): “[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other belief.” In Article 4 (1), the General Assembly further states that: “All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms [...]” Furthermore, we would like to refer your Government to Article 4(2) according to which: “All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter. According article 6 (d), the right to freedom of thought, conscience, religion or belief includes also the freedom “to write, issue and disseminate relevant publications in these areas”, and read in conjunction with the principles contained in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (A/HRC/22/17/Add.4), any statement or expressed opinion should fulfil the six part threshold test of context, content and form, speaker, intent, extent of the speech act, and likelihood/imminence, in order to be considered as a criminal offence.

Furthermore, Article 27 of the ICCPR establishes that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities have the right, in community with the other members of their group, “to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

Furthermore, we refer to the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in General Assembly resolution 47/135, which refers to the obligation of States to protect the existence and the identity of minorities within their territories and to adopt measures to that end (article 1) as well as to adopt the required measures to ensure that persons belonging to minorities can exercise their human rights without

discrimination (article 4).

We respectfully remind your Excellency's Government of the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180. All these resolutions require that States must ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.

With respect to the use to counter terrorism and extremism justifications to restrict the legitimate exercise of freedom of expression, we would like to underline that any restriction on expression or information that a government seeks to justify on grounds of national security and counter terrorism must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest (CCPR/C/GC/34). We would like to stress that counter terrorism legislation with penal sanctions should not be misused against individuals peacefully exercising their rights to freedom of expression and freedom of peaceful association and assembly. These rights are protected under ICCPR and non-violent exercise of these rights is not a criminal offence. Counter terrorism legislation should not be used as an excuse to suppress peaceful minority groups and their members.

With regard to the article 256 of the Criminal Code, we note the exceptionally wide definition of terrorism therein. We bring your Excellency's Government attention to the "principal of legal certainty" under international law (ICCPR Article 15(1); ECHR Article 7(1)) which requires that criminal laws are sufficiently precise so it is clear what types of behavior and conduct constitute a criminal offence and what would be the consequence of committing such an offence. This principle recognizes that ill-defined and/or overly broad laws are open to arbitrary application and abuse. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has highlighted the dangers of overly broad definitions of terrorism in domestic law that fall short of international treaty obligations (A/73/361, para. 34).

We remind your Excellency's Government about recommendations addressed to Kazakhstan by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism following her country visit in 2019; by the Human Rights Committee in the context of its 2016 review of Kazakhstan (CCPR/C/KAZ/C0/2, para. 50); and the ones addressed during the country's UN Universal Periodic Review on 7 November 2019, which notably called for the amendment of article 174 of the Criminal Code on incitement of social, clan, national, racial or religious discord, to remove its vague concepts, and to bring it in line with the international human rights standards, for the purpose of guaranteeing the rights to freedom of expression, peaceful assembly and association, and thought, conscience, religion or belief (recommendations no. 139.95; 139.96; 139.97; 139.101).

In particular, we refer to the assessment of, and reiterate the concerns expressed by the United Nations Special Rapporteur on the protection of fundamental rights and liberties while countering terrorism, at the end of her visit to Kazakhstan in

2019: “The use of extremism laws against political groups and critical voices is a worrisome practice and detracts from the genuine and much-needed work globally of addressing distinct and certain terrorism challenges as defined by international law.” Specifically she highlighted concerns about the fairness of investigations and closed trials in cases of terrorism and extremism, and the lack of transparency in the substance and outcomes of such proceedings.ⁱ

Finally, we would like to refer your Excellency’s Government to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular rule 58 which states that prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals, and rule 59 which indicates that prisoners shall be allocated, to the extent possible, to prisons close to their homes or their places of social rehabilitation. We also underline that according to rule 39, no prisoner shall be sanctioned except in accordance with the terms of the law or regulation referred to in rule 37 and the principles of fairness and due process. Furthermore, rule 41 states that prisoners shall be allowed to defend themselves in person, or through legal assistance when the interests of justice so require, particularly in cases involving serious disciplinary charges.

ⁱ Fionnuala Ní Aoláin, News release, 17 May 2019.