

**COMMUNICATION FOR THE UNITED NATIONS ORGANIZATION
COMMITTEE FOR HUMAN RIGHTS**

on the case of

YESERGEPOV RAMAZAN TAKHTAROVICH

versus

REPUBLIC OF KAZAKHSTAN

Submitted for review under Optional Protocol to the International Covenant on Civil and
Political Rights

*United Nations Organization Committee for Human Rights
To: Complaints Procedure Unit of the
United Nations Organization
Switzerland
1211 Geneva 10
Avenue de la Paix 8-14*

CONTENT:

I. AUTHOR OF THE COMMUNICATION (COMPLAINANT).....	3
II. STATE PARTY CONCERNED	3
Name of the state-party (State) to the International Covenant and Optional Protocol against whom the communication is being submitted.....	3
III. ADMISSIBILITY	3
Submission of a complaint to other international organizations	3
All the available remedies were exhausted	3
Articles of the Covenant alleged to have been violated	4
IV. FACTS AS PRESENTED	4
Summary of the facts	4
V. FACTS	6
Background	6
Responses of the Prosecution Office	7
Judicial proceedings pertaining to the civil claim of the Complainant	8
Adjudication of the case by the Supreme Court of the Republic of Kazakhstan	10
VI. VIOLATION OF THE ICCPR	11
Violation of article 2, paragraph 3, subparagraph a), b), c) of the Covenant	11
Violation of article 9, paragraph 1 of the Covenant	12
Violation of article 9, paragraph 5 of the Covenant	12
VII. NATURE OF THE DEMAND	13
VIII. CHECKLIST OF SUPPORTING DOCUMENTS	14

I. AUTHOR OF THE COMMUNICATION (COMPLAINANT)

1. The communication is being submitted by **Yesergepov Ramazan Takhtarovich**

Surname: Yesergepov

Name, patronymic name: Ramazan Takhtarovich

Nationality: Republic of Kazakhstan citizen

Ethnic origin: Kazakh

Occupation: Journalist

Date and place of birth: April 30, 1956, Kamenevka village, Shemonaikha district, East Kazakhstan province, Kazakhstan

Present residence address: 113, Kyz-Zhibek street, Almaty, Kazakhstan, 050020

2. The communication to the Committee on Human Rights of the United Nations Organization on behalf of the Author is being submitted by the Kazakhstan International Bureau for Human Rights and Rule of Law. The appropriate signed authorization attached (Annex No.29).

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II. STATE PARTY CONCERNED

Name of the State that is a party to the International Covenant and Optional Protocol against which the communication has been submitted:

4. The communication has been submitted against the Republic of Kazakhstan ("Kazakhstan" or "State Party"), party to the International Covenant on Civil and Political Rights and the First Optional Protocol thereof.

5. Kazakhstan has ratified ICCPR on January 24, 2006; Kazakhstan has signed the Optional Protocol to the ICCPR on September 25, 2007 and has acceded to this instrument on June 30, 2009. The Optional Protocol is in effect since September 30, 2009 for Kazakhstan.

III. ADMISSIBILITY

6. Communication submitted on behalf of Mr. Yesergepov meets admissibility criteria under the Covenant and Optional Protocol.

Submission of a complaint to other international organizations

7. The communication is not being revised and has never been revised under any other procedure of international investigation or regulation and therefore it meets the requirement of article 5 paragraph 2(a) of the Optional Protocol.

All the available remedies were exhausted

(for more detailed information see Section V of the communication)

8. 15.03.2012. The Complainant has filed a claim with the Medeu district court of Almaty (*Annex No. 1*) to challenge unlawful actions and inaction of the state officials (see article 278, paragraph 1, 2 of Civil Procedure Code of the Republic of Kazakhstan in effect of 13.07.1999 No.411-I (amended))¹ (hereinafter CPC RK).

9. 24.04.2012. the Medeu district court of Almaty has ruled to deny satisfaction of the Complainant's claim entirely (*Annex No.2*).

10. 01.06.2012. Appellate Panel of Judges of the Almaty city court upheld the ruling of the Medeu district court of Almaty of 24.04.2012 and dismissed the Complainant's claim (*Annex No.3*).

11. 16.08.2012. Court of Cassation of the Almaty city court has upheld the ruling of the Medeu district court of Almaty of 24.04.12 and Decree of Appellate Panel of Judges of the Almaty city court of 01.06.2012 and denied satisfaction of the Complainant's appeal in cassation (*Annex No.4*).

12. 29.11.2012. Supervisory Panel of Judges for Civil and Administrative Cases has delivered a Decree on initiation of supervisory proceedings to revise the ruling of the Medeu district court of Almaty and Decrees of the Appellate Panel of Judges and Court of Cassation of the Almaty city court (*Annex No.5*).

13. 11.01.2013. Supervisory Panel of Judges for Civil and Administrative Cases of the Supreme Court of the Republic of Kazakhstan has ruled to partially satisfy Complainant's motion for supervision (*Annex No.6*).

Articles of the Covenant alleged to have been violated

14. Kazakhstan has allegedly violated the following provisions of the International Covenant on Civil and Political Rights in relation to the Complaint: **article 2, paragraph 3, subparagraph a), b), c) of the Covenant; article 9, paragraph 1, 5 of the Covenant.**

IV. FACTS AS PRESENTED

Summary of the facts

15. On August 8, 2009, No.2 court of Taraz city, Zhambyl province, has ruled the Complainant guilty of committing crimes under articles 172, part 1 and 339, part 2 of the Criminal Code of the Republic of Kazakhstan (hereinafter CC RK) and under article 58, part 2 CC RK, has immutably sentenced the Complainant to imprisonment for 3 years and deprived him of the right to be engaged in publishing and journalism for 2 years (*Annex No.7*).

¹ Article 278. Submission of the claim

1. 1. A citizen or a legal person shall have the right to challenge a decision, an action (or inaction) of a state body, local self-government body, public association, organization, an official, state servant directly in the court. Preliminary appealing to the higher-level authorities and organizations, or an official is not an obligatory condition for submitting application to the court and its admission by the court for considering and settling.

2. The application shall be submitted to the court by the rules of jurisdiction specified in the Chapter 3 of this Code. The application consideration of which was related to jurisdiction of the district courts, may be submitted to the court at the place of residence of the person or the court at the location of the state body, local self-government, public association, organization, an official, state servant, actions of which are challenged

16. The Complainant has served the appointed punishment in general regime penal colony ZhD-158/2 of the Zhambyl province of the Republic of Kazakhstan.

17. During the term the Complainant has addressed several times the Penal Executive System Committee of the Ministry of Internal Affairs of the Republic of Kazakhstan (hereinafter PESC MIA RK), administration of the penal institution ZhD 158/2, Special Prosecutor of the Zhambyl province with the question of what the exact date of his release upon expiry of the term was.

18. The Complainant was detained on **January 6, 2009**, and sentenced to three years of imprisonment, and, based on the provisions of the law regulating punishment via imprisonment stipulating release of the inmate in the first half of the last day of the term the Complainant supposed that he should be released before noon on **January 5, 2012**.

19. However, prison administration, PESC MIA RK and prosecution bodies have informed the Complainant that the last day of his term is January 6, 2012, they believed. Meanwhile, they also informed the Complainant that such practice was exercised for more than one year and all inmates in the Zhambyl province are released in the first part of the day corresponding to the date of detention, arrest or taking under custody in the courtroom due to conviction.

20. Efforts of the Complainant to prove, with reference to article 62, part 1 CC RK on "Calculation of punishment and offset of punishment", whereby period of punishment is calculated in months and years² and article 173 of Penal Executive Code of RK (hereinafter PEC RK) on "Discontinuation of serving the term and procedure of release", whereby when calculating the term in months, the term expires on the corresponding date of the last month³, hence he should be released **in the first part of the day on 05.01.2012**, were spent in vain.

21. The Complainant has served the appointed punishment in full, but he was released on **January 6, 2012** – upon completion of the term, as stated in the **certificate of release No.003719** indicating that the Complainant has been serving his term in an institution from **06.01.2009 to 06.01.2012** (*Annex No.8*).

22. Under the ruling of No.2 city court of Taraz of the Zhambyl province of 08.08.2009, the term of punishment for the Complainant shall begin on 06.01.2009, while the sentence fails to indicate that term of punishment is calculated in hours. Therefore, three years of imprisonment, calculated starting from January 6, 2012 shall end on January 5, 2009 and **the release of the Complainant should have taken place in the first part of 05.01.2012 and not of 06.01.2012** (*Annex No.7*).

23. This way, the Complainant has been illegally deprived of his liberty for one day after actual expiry of imprisonment term. The Complainant believes that the officials, being at the same time civil servants of the state agencies have demonstrated inaction resulting in delayed release of the Complainant. Meanwhile, these officials were informed of the Complainant's health

² CC RK, part 1, article 62 Calculation of punishment and offset of punishment

The terms of deprivation of the right to occupy certain positions or to engage in certain actions, as well as the terms of corrective labor, restriction in military service, restriction of liberty, detention in a guard-house, and terms of deprivation of liberty, shall be calculated in months and years, and terms of engagement in community service shall be calculated in hours.

³ PEC RK, part 2, article 173 Discontinuation of punishment and procedure of release

2. Convicted to military detention and deprivation of liberty shall be released in the first half of the day on the last day of the term. If the last day of the term is a holiday or a week-end the convict shall be released on the day prior to holiday or week-end. For calculating of the punishment term, it shall expire on the corresponding day of the last month, when such month does not have a corresponding day – on the last day of that month.

problems, because he has timely provided discharge epicrisis, indicated that he is subject to regular medical check-ups and was treated at inpatient facility for ischemic heart disease; advanced angina; 3 degree arterial hypertension, risk 4; hypertensive heart discirculatory encephalopathy; congestive heart failure 11A, 3 functional class; 2 type diabetes mellitus of medium gravity, subcompensated metabolism; chronic diffuse bronchitis, incomplete remission (*Annex No.9*).

The Complainant is convinced that illegal detention for one extra day was a continuation of political reprisal implemented through fabrication of a criminal case against him in his capacity of Chief Editor for the article in the paper on “Who rules the country – President or CNS?” (Complaint No. 2129/2012 was registered by the UN Human Rights Committee)/

24. 15.03.2012. The Complainant has filed a claim with the Medeu district court against RK Prosecutor General, RK Minister of Internal Affairs, the Zhambyl province Prosecutor and the Prison Governor to deem unlawful the inaction of state officials of the state bodies: RK Prosecutor General Daulbayev A.K., RK Minister of Internal Affairs K. N. Kassymov, the Zhambyl province Prosecutor B. T. Taimbetov and the Governor of ZhD-158/2 prison facility of the Department of Penal Executive System of the Zhambyl province of PESC MIA RK institution Zh.Zhanbayev, during review of his complaint, motion to find detention in custody for one extra day unlawful and demand to redress for arbitrary detention.

25. 24.04.2012. The Medeu district court of Almaty has dismissed the Complainant’s claim.

26. To challenge this decision the Complainant has filed a claim with the Almaty city court, but the Appellate Panel of Judges of the Almaty city court has also dismissed the Complainant’s claim on 01.06.2012.

27. The complainant filed a claim with the Court of Cassation of the Almaty city court, but the latter has, on 16.08.2012, dismissed the claim of the Complainant.

28. The Complainant has filed a supervisory appeal with the Supreme Court of Kazakhstan and, on 11.01.2013 the Supervisory Panel for Civil and Administrative Cases of the Supreme Court of the Republic of Kazakhstan has deemed unlawful detainment of the Complainant for one extra day but denied the right to compensation.

V. FACTS

Background

29. On January 5, 2009, senior investigator of the Committee for National Security Zhambyl province department (hereinafter CNSD) G. Budanbekov has illegally initiated criminal proceedings against the Complainant under article 228 CC RK “Abuse of powers” (*Annex No.28*) and pursuant to article 132 CPC RK the Complainant was detained on 06.01.2009, while on January 9, 2009, No.2 city court of Taraz has sanctioned his arrest. Later, No.2 city court of Taraz has dismissed the charges under article 228 CC RK “Abuse of powers” due to refusal of Prosecutor General’s Office. Hence, detention and transfer from the hospital in Almaty to CBSD of the Zhambyl province in Taraz for 600 km distance was found unlawful (*Annex No. 7*).

30. August 8, 2009. No.2 city court of Taraz of the Zhambyl province has ruled the Complainant guilty of committing crimes stipulated under articles 172 part 1 “Illegal receipt, disclosure and dissemination of state secrets”, 339, part 2 “Obstruction of justice and preliminary

investigation procedure” of CC RK and under article 58, part 2 of CC RK he was sentenced immutably to imprisonment for 3 (three) years in the general security regime colony and deprived of the right to be engaged in publishing and journalism for 2 (two) years. The sentence indicates that **term of punishment shall be calculated starting from January 6, 2009.**

31. The Complainant has served the appointed punishment in prison facility ZhD-158/2 of Penal Executive System Department (hereinafter PESD) of the Zhambyl province of PESC MIA RK.

32. The Complainant has completed the appointed term in full and was released upon discharge of the punishment term, as stated in **certificate of release No.003719** indicating that the Complainant has been serving his term in an institution from **06.01.2009 to 06.01.2012** (*Annex No.8*).

33. While in detention, the Complainant has addressed the following superior state bodies regarding the date of his actual release:

- 21.12.2011 – Prosecutor of the Zhambyl province (*Annex No.10*);
- 23.12.2011 – RK Prosecutor General A.Daulbayev (*Annex No.11*);
- 23.12.2012 – RK President N.Nazarbayev (*Annex No.12*);
- 26.12.2011 – Governor of prison ZhD-158/2 PESD PESC MIA RK Zh.Zhanbayev (*Annex No.13*);
- 26.12.2011 – RK Minister of Internal Affairs K.Kassymov (*Annex No.14*).

34. The spouse of the Complainant R.N.Yesergepova has addressed the following superior state bodies to prevent the Complainant’s unlawful detention:

- 21.12.2011, incoming registration No.114845 – blog of the RK Minister of Internal Affairs (hereinafter MIA RK) K.Kassymov (on 04.01.2012 the Minister has explained that in line with article 173, part 2 CEC RK, the Complainant shall be released in the first part of 06.01.2012) (*Annex No.15*);
- 26.12.2011 – RK Prosecutor General A.Daulbayev (*Annex No. 16*);
- 04.01.2012 – Prosecutor of the Zhambyl province (*Annex No.17*);
- 05.01.2012 – Governor of prison ZhD-158/2 PESD PESC MIA RK Zh. Zhanbayev (*Annex No.18*);
- 06.01.2012 – RK Security Council Secretary M. Tazhin (*Annex No.19*).

35. Acting Director of Kazakhstan International Bureau for Human Rights and Rule of Law has addressed Prosecutor of the Zhambyl province concerning the prevention of unlawful detention of the Complainant (*Annex No.20*).

36. The responses of all of the above listed state bodies were received either after the release of the Complainant or the responses were runaround replies, or were explaining that under article 173, part 2 CEC RK, the Complainant was correctly released in the first part of the day on 06.01.2012.

37. **On 06.01.2012, at 08:42 the Complainant was released from custody, i.e. the day following the date when the 3-year period of detention determined by the court ruling has expired.**

Responses of the Prosecution Office

38. 05.01.12. Special prosecutor, Junior counselor of justice N. Rakishev has explained to Prison Governor of ZhD-158/2 PESD of the Zhambyl province, Colonel of justice Zh.

Zhanbayev, that under article 173, part 2 CEC RK, the Complainant shall be released correctly in the first part of the day on 06.01.2012 (*Annex No.21*).

39. 06.01.2012. Deputy Prosecutor of the Zhambyl province K. Nogaibekov, having revised the appeal of the Complainant to take measures of prosecutorial response to the incorrect application of article 173, part 2 CEC RK, has explained that under article 173, part 2 CEC RK, the Complaint was correctly released in the first part of the day on 06.01.2012 (*Annex No.22*).

40. 10.01.2012. Head of RK Prosecutor General's Office Department N. Abdirov has informed that appeal of the Complainant was forwarded to the Prosecutor of the Zhambyl province (*Annex No.23*).

41. 11.01.2012. Deputy Prosecutor of the Zhambyl province K. Nogaibekov has informed that the Complainant was correctly released in the first part of the day on 06.01.2012 (*Annex No.24*).

42. 12.01.2012. Head of RK Prosecutor General's Office Department has forwarded the response of the RK Presidential Administration to the Prosecutor of the Zhambyl province B. Taimbetov (*Annex No.25*).

43. 18.01.2012. Deputy prosecutor of the Zhambyl province K. Nogaibekov has informed that in line with the ruling sentencing the Complainant to 3 years of imprisonment, the term of punishment to be served shall be calculated starting from 06.01.2009. To that end, under article 173, part 2 CEC RK, the Complainant was correctly released in the first part of the day on 06.01.2012 (*Annex No.26*).

44. **This way, the superior supervising body – the prosecutor's office failed to take appropriate measures to prevent unlawful detention of the Complainant after the expiry of the term of punishment appointed by the court.**

Judicial proceedings pertaining to the civil claim of the Complainant

45. 24.04.2012. The Medeu district court of Almaty, chaired by judge B. Tazhikhanov has reviewed the civil claim of the Complainant against RK Prosecutor General, RK Minister of Internal Affairs, Prosecutor of the Zhambyl province, Governor of ZhD-158/2 PESD PESC MIA RK prison to find their action unlawful, and to find the inaction of state officials: RK Prosecutor General A. Daulbayev, RK Minister of Internal Affairs K. Kassymov, the Zhambyl province Prosecutor B. Taimbetov and Governor of ZhD-158/2 PESD PESC MIA RK Prison Zh. Zhanbayev during revision of the claims, appeals, motions to determine the exact date of release upon expiry of punishment appointed by the No.2 city court of Taraz of 08.08.2009 unlawful, and to demand compensation for moral damage and for forced obligation to bring formal apologies in media by publishing them in "Kazakhstanskaya Pravda" and "Yegemen Kazakhstan" papers.

46. M. Tleuberdiyev representing the RK Prosecutor General and Prosecutor of the Zhambyl province, M. Samiyev representing RK Minister of Internal Affairs and R. Rustamova representing ZhD-158/2 PESD PESC MIA RK prison facility did not accord the claim and **have explained** to the court that criminal charges were brought against the Complainant on January 6, 2009 at 15:00, and No.2 city court of Taraz has sanctioned his arrest on January 9, 2009. The court has convicted the Complainant under articles 172 part 4, 339, part 2 of CC RK and has sentenced him to imprisonment for 3 (three) years to be served in the general security regime

colony and deprived him of the right to be engaged in publishing and journalism for 2 (two) years. The Complainant was transferred to prison ZhD-158/2 PESD of Zhambyl province PESC MIA RK where he has completed the term and **was released from the abovementioned prison on January 6, 2012, at 08:42.**

47. In the course of the trial, the Complainant has provided number of documents which had a determinative meaning to resolve the dispute correctly.

48. The Complainant has presented a **Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan of April 13, 2012 No.2.** “On official interpretation of the provisions of the Constitution of the Republic of Kazakhstan on calculation of term and notion of the term duration”, which provides explanation as to calculation of constitutional term and definition of the “year” time period. It explicitly indicates that constitutional term determined in years shall to be calculated from the date when the event indicated in the Constitution took place and shall expire on the corresponding month and date of the last year of the term. The time period of “year” when applied to article 61, paragraph 6 of the Constitution implies the current year (from January 1 to December 31) (*Annex No.27*).

49. The Complainant has provided **the letter of A. Sekishev Deputy Prosecutor General of RK to A. Kurenbekov Deputy Minister of Internal Affairs of RK No.3508, dated 03.04.2012.** The letter reported about the results of the analysis carried out to reveal the practice of enforcing article 173 CEC RK in correctional facilities of the Penal Executive System Committee of the RK Ministry of Internal Affairs. The analysis of practical enforcement of the provision has proved ambiguous practice of determining the last day of imprisonment term which has established in Kazakhstan. The following was revealed: in 2011 in 11 out of 15 regions where correctional facilities are located, the inmates were released on the day determined in line with the following scheme: for example, imprisonment term – 1 year, begins on January 5, 2010, ends on January 5, 2011. In 4 regions the inmates were released one day earlier, and another scheme of calculation applied: for example, imprisonment term – 1 year, begins on January 5, 2007, ends on January 4, 2008. Based on this data, the letter clearly defines the correct scheme for calculation of the term in years and months. When the beginning of the term is January 1, and end of the term is the same day, January 1 of the following year, then such calculation is wrongful, since when calculation of the term in months and years the last day of the year is the day preceding the corresponding day of the next year. For instance, when defining conventionally the 1 year term of punishment, if it begins on January 1, 2010, the end of the term shall be December 31, 2010 (*Annex No.28*).

50. The court has failed to mention the above listed documents in the descriptive part and declaration of intent, irrespective of the fact that these documents were deposited to the civil case materials upon the Complainant’ motion.

51. In the course of the trial, the Complainant has explained the details of place and time of actual detention by the RK CNS officers, who, on 06.01.2012 at 07:00 took him up from the Kazakh R&D Institute of Cardiology and Internal Diseases in Almaty, where he was receiving the treatment.

52. The Medeu district court of Almaty has dismissed the Complainant’s claim due to assumption that violation of imprisonment term did not take place and that his rights were not violated. The court has indicated that since the Complainant was detained on 06.01.2009 at 15:00, he was lawfully released in the first part of the day on 06.01.2012. The court ignored the fact that time of actual detention which is registered in hours and minutes shall not be used for

calculation of the term in years, and that only the date of the actual detention is to be used. (*Annex No.2*)

53. Having disagreed with the decision of the Medeu district court of Almaty, the Complainant has filed an appeal with the Appellate Panel of Judges of Almaty city court on 01.06.2012. The Appellate Panel of Judges of Almaty city court has upheld the decision of Medeu district court.

54. The Appellate Panel of Judges of Almaty city court states that “Actions (inaction) of bodies and officials - the Defendant party in form of behavior demonstrated during revision of the Complainant’s appeals and in form of their responses do not have mandatory instructions (rules of conduct) entailing legal consequences. Behavior of the defendants when revising appeals is the mandatory component required to perform duties under their competence. At the same time, their responses were not of regulatory nature, i.e. they did not determine norms (rules of conduct) mandatory for any circle of persons, to be exercised regularly and did not bear individual character, i.e. did not determine or did not cancel the rights and duties of a certain person. The administration of the facility is obliged, due to imposed functions and in line with the provisions of article 173 CEC RK, enforce the sentence, including duly release of the person”.

55. The Appellate Panel of Judges of Almaty city court did not take into consideration the Regulatory Resolution of the Republic of Kazakhstan Supreme Court No.20, of 24.12.2010 “**On certain aspects of applying by the courts of article 27 of the Civil Procedure Code of the Republic of Kazakhstan**”, where paragraph 2 reads: “The decision of a state body, local administration body, action (inaction) of an official or a civil servant can be challenged in court, should the complainant believe that: 1) his/her legal rights, freedoms or legal interests were violated”. Under paragraph 6: “The actions which may be challenged in line with article 27 CPC RK include authoritative demand of an official or a civil servant, which may not represent a decision, but which entail any of the legal consequences for the complainant covered in article 279 CPC RK. Such actions include, *inter alia*, demands of an official or a civil servant expressed orally while performing executive-administrative functions, functions of an authority representative, state supervision or control”. Meanwhile, under paragraph 7: “Actions, which can be challenged in line with article 27 CPC RK, include non-execution by an official or a civil servant of duties, imposed by normative-regulatory acts (job description, instructions, rules and orders). Inaction, *inter alia*, includes leaving the appeals of citizens or legal entities unattended fully or partially, responding formally to an appeal, should consideration of such appeal fall under the competence of an official or a civil servant”.

The listed aggregate of evidence proves to the fullest extent effective actions and inaction of the officials of state bodies resulting in violation of the Complainant’s right and causing moral damage, and testifies legality of his demands. (*Annex No.3*)

56. 16.08.2012. The Almaty Court of Cassation has upheld the decision of the Medeu district court of Almaty of 24.04.2012 and the Decree of the Appellate Panel of Judges of Almaty city court of 01.06.2012 and dismissed the Complainant’s appeal in cassation. (*Annex No.4*)

Adjudication of the case by the Supreme Court of the Republic of Kazakhstan

57. The Complainant has filed a supervisory appeal with the Supreme Court of the Republic of Kazakhstan. On 29.11.2012 the Supervisory Panel of Judges for Civil and Administrative Cases of the Supreme Court of the Republic of Kazakhstan has delivered a Resolution to launch proceedings to revise the Decision of Medeu district court of Almaty of 24.04.2012, Decree of

the Appellate Panel of Judges of Almaty city court of 01.06.2012, and Decree of Court of Cassation of Almaty city court of 16.08.2012. (*Annex No.5*)

58. 11.01.2013. The Supervisory Panel of Judges for Civil and Administrative Cases of the Supreme Court of the Republic of Kazakhstan has ruled to **reverse** the Decision of Medeu district court of Almaty of 24.04.2012, Decree of the Appellate Panel of Judges of Almaty city court of 01.06.2012, and Decree of Court of Cassation of Almaty city court of 16.08.2012 **on the claim brought by the Complainant**. The listed legal acts were reversed in parts pertaining to dismissal of the Complainant's claim to recognize unlawful actions and inaction of the Governor of ZhD-158/2 PESD PESC MIA RK prison facility Zh.Zhanbayev, having granted his appeal pertaining to the indicated part. The remaining parts of the legal acts to this end were left without amendment. (*Annex No.6*)

The Supreme Court of RK has recognized that the Complainant has addressed without undue delay the authorities with a legitimate demand to determine correctly the date of his release but his claim was not granted. Besides, the Supreme Court of RK has ruled that judiciary authorities, when revising the Complainant's reasoning, have misinterpreted provisions of the law pertaining to calculation of the punishment term.

59. In such a way, the supervisory appeal of the Complainant was granted partially.

The following claims of the Complainant were dismissed:

- to deem as unlawful actions and inaction of state officials of the state bodies and namely, Prosecutor General of the Republic of Kazakhstan A. Daulbayev, Minister of Internal Affairs of the Republic of Kazakhstan K. Kassymov, Prosecutor of the Zhambyl province B. Taimbetov;
- collect from above-listed persons **monetary compensation for caused moral damage** in the amount of 10,000,000 tenge (ten million tenge), which equals \$65,000 (sixty five thousand) US dollars in favour of the Complainant for undue release of the Complainant from prison (illegal detention), and
- to compel these officials bring formal apologies in media.

60. The Supreme Court of RK has ruled that actions (inaction) of RK Prosecutor General, RK Minister of Internal Affairs and Prosecutor of the Zhambyl province were not unlawful, since "neither law, nor official powers prescribe determining of an inmate's release day as their functional duty".

61. In essence, the supreme judicial body – the Supreme Court of the Republic of Kazakhstan, in its Resolution of 11.01.2012 has ruled unlawful detention in custody of the Complainant from 5th to the 6th of January 2012 and as entailing perpetration of the Complainant's rights but refused to recognize his right for redress.

62. The Supreme Court of RK, in its Resolution of 11.01.2012, has indicated that "there are no legal grounds to impose collection of compensation for moral damage from the officials, for **their guilt is not determined, while misinterpretation of the law may not be referred to as a culpable action**".

VI. VIOLATIONS OF THE ICCPR

Violation of article 2, paragraph 3, subparagraph a), b), c) of the Covenant

63. The Republic of Kazakhstan has violated its commitments pertinent to **article 2, paragraph 3, subparagraph a), b), c) of the Covenant**, having partially granted the claim of the

Complainant, having denied recognition as unlawful actions (inaction) of the state officials: RK Prosecutor General A. Daulbayev, RK Minister of Internal Affairs K. Kassymov, the Zhambyl province Prosecutor B. Taimbetov, in the course of handling the Complainant's complaints, appeals and motions to determine the exact date of completion of the Complainant's term of imprisonment resulting in moral damage caused to the Complainant.

64. Pursuant to article 2, paragraph 32 of the Covenant the Complainant has the right for effective remedy, while an appropriate obligation shall be imposed upon a State responsible for violation to ensure such judicial remedy in line with the international norms.

65. **According to the General Comment No.8 to article 9 of ICCPR** "States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant".

66. **In line with paragraph 14 of the General Comment No.33 The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights:** "Under article 2, paragraph 3 of the Covenant, each State party undertakes "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity." This is the basis of the wording consistently used by the Committee in issuing its views in cases where a violation has been found.

"In accordance with article 2, paragraphs a), b), c) of the Covenant, the State party is required to provide the author with an effective remedy. By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2, paragraph 3 a) of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established."

Violation of article 9, paragraph 1 of the Covenant

67. The Republic of Kazakhstan has violated its obligations pursuant to article 9, paragraph 1 of the Covenant having allowed for illegal detention of the Complainant in custody from January 5 to January 6, 2012.

68. Due to the fault of the state, represented by the prosecution bodies as well as officers of the penitentiary institution, the Complainant was released from prison unduly. In fact, he was illegally detained in violation of the rule of law principle.

69. As for the rule of law principle, based on UN Human Rights Committee Jurisprudence "it is violated when any person is arrested or detained on the grounds not foreseen directly by the national legislation"; in other words, grounds for arrest and detention in custody should be foreseen by the law⁴. The state did not have any legal grounds to hold the Complainant from January 5 to January 6, 2012 under custody in the correctional facility.

⁴ Communication No. 702/1996, Clifford McLawrence vs. Jamaica (considerations adopted on July 18, 1977), UN document, GA Reports, A/52/40 (volume II), pages. 226-227, paragraph 5.5

70. It goes without saying that upon completion of the appointed term of imprisonment the convicted person must be released. As for the cases, when upon expiry of the full term of the sentence, the convict was not released the UN Human Rights Committee has, unambiguously, determined that further detention in custody was in violation of article 9, paragraph 1 of the International Covenant on Civil and Political Rights⁵.

Violation of article 9, paragraph 5 of the Covenant

71. For undue release of the Complainant from prison (arbitrary detention) pursuant to article 9, paragraph 5 of the Covenant, he shall receive fair and adequate compensation and redress for the caused damage, including restriction of liberty, physical and psychological sufferings. However, **the court denied payment of compensation entirely.**

72. Detention in custody after legal arrest should not only be lawful, but reasonable and necessary. Under these particular circumstances the State did not have grounds to hold the Complainant in custody from January 5 to January 6 2012. **Existence of an unambiguous practice, as stated in the letter of RK Prosecutor General (Annex No.27), can be classified as a violation of the principle of uniform enforcement of the laws in the State Party.**

VII. NATURE OF THE DEMAND

Based on the above, the Complainant respectfully asks the Committee:

73. To declare that the State Party, Republic of Kazakhstan with regard to the Complainant **has violated the following articles of the International Covenant on Civil and Political Rights: article 2, paragraph 3, subparagraph a), b), c), article 9, paragraph 1, 5.**

74. To recommend the Republic of Kazakhstan to revise court rulings with regard to the Complainant in the context of the provisions of the International Covenant pertinent to:

- recognition as unlawful inaction of the officials – state bodies, namely Prosecutor General of the Republic of Kazakhstan, Minister of Internal Affairs of the Republic of Kazakhstan, Prosecutor of the Zhambyl province to ensure prevention of illegal and arbitrary detention in custody of any individual and to prevent such violations in the future;
- to collect **monetary compensation in favour of the Complainant to compensate for moral damage** for undue release of the Complainant from custody (violation of the rights covered by the Covenant).

75. To recommend the Republic of Kazakhstan to **amend the provisions of the Criminal Procedure Code of RK concerning calculation of punishment term to ensure uniform enforcement by correctional facilities of the article 173 CEC RK.**

76. To recommend the Republic of Kazakhstan to ensure that:

- **person can be deprived of liberty only on the grounds and in line with the procedures established by the law;**
- **to treat all detainees humanely and with respect, and to respect international standards to this end.**

77. To recommend the Republic of Kazakhstan **to take measures to prevent violations of such kind in the future.**

⁵ Communication No. R. 2/8, A.M. Garcia Lanza de Netto on behalf of B. Weismann Lanza and Lanza Perdomo (Views adopted on 3 April 1980), b UN doc/ GAOR, A 35/40, p/ 118, para. 16

VIII. CHECKLIST OF SUPPORTING DOCUMENTS

1. Claim
2. Decision of the Medeu district court of Almaty of 24.04.2012
3. Decree of the Appellate Panel of Judges of Almaty city court of 01.06.2012
4. Decree of the Court of Cassation of Almaty city court of 16.08.2012
5. Resolution of the Supervisory Panel of Judges for Civil and Administrative Cases of the Supreme Court of the Republic of Kazakhstan of 29.11.2012
6. Resolution of the Supervisory Panel of Judges for Civil and Administrative Cases of the Supreme Court of the Republic of Kazakhstan of 11.01.2013
7. Ruling of No.2 city court of Taraz of the Zhambyl province of 08.08.2009
8. Certificate of release No.003719 of 06.01.2012
9. Discharge epicrisis
10. Appeal to Prosecutor of the Zhambyl province of 21.12.2011
11. Appeal to RK Prosecutor General of 23.12.2011
12. Appeal to RK President of 23.12.2012
13. Appeal to Governor of ZhD-158/2 PESD PESC MIA RK prison facility of 26.12.2011.
14. Appeal to the RK Minister of Internal Affairs of 26.12.2011.
15. Reply of the RK Minister of Foreign Affairs in response to the appeal of the Complainant's spouse of 21.12.2011
16. Appeal to RK Prosecutor General of 26.12.2011
17. Appeal to the Prosecutor of the Zhambyl province of 04.01.2012
18. Appeal to Governor of ZhD-158/2 PESD PESC MIA RK prison facility of 05.01.2012
19. Appeal to the Security Council Secretary of 05.01.2012
20. Appeal to Prosecutor of the Zhambyl province and Acting director of the Kazakhstan International Bureau for Human Rights and Rule of Law
21. Reply of the Special prosecutor junior counselor of justice N. Rakishev of 05.01.2012
22. Reply of the Prosecutor of the Zhambyl province of 06.01.2012
23. Reply of the General Prosecutor's Office Department Head of 10.01.2012
24. Reply of the Deputy Prosecutor of the Zhambyl province of 11.01.2012
25. Reply of the General Prosecutor's Office Department Head of 12.01.2012
26. Reply of the Prosecutor of the Zhambyl province of 18.01.2012
27. Regulatory Resolution of the RK Constitutional Council
28. Letter of the Deputy Prosecutor General to the Deputy Minister of Internal Affairs of RK of 03.04.2012
29. The order of investigator G. Budanbekov of 05.01.2009
30. Authorization on behalf of the Author

Ramazan T. Yesergepov

Roza M. Akylbekova, Director of the
Kazakhstan International Bureau for Human
Rights and Rule of Law

“ ” _____ 2013

Almaty, Republic of Kazakhstan