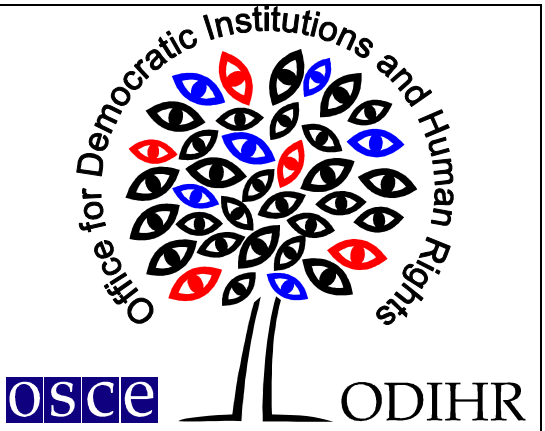
Warsaw, 24 September 2009 Opinion-Nr.: MIG – KAZ/137/2009 [AT] www.legislationline.org	

Opinion

On the Draft Law of the Republic of Kazakhstan on Migration of the Population

based on an English translation of the draft law provided by the OSCE Centre in Astana.

Comments on Articles 1 par. 14, 44 and 46 of the Draft have been provided with the help of Professor Cole Durham of the OSCE ODIHR Advisory Panel on Freedom of Religion or Belief

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I. INTRODUCTION

1. *On 2 June 2009, by letter addressed to the Head of the OSCE Centre in Astana, the Ministry of Labor and Social Protection of the Republic of Kazakhstan requested an Opinion on the Draft Law of the Republic of Kazakhstan on Migration of the Population (hereinafter referred to as "the Draft").*

2. *Thereafter, the OSCE Centre in Astana referred the request to the OSCE ODIHR. While the initial time-frame for completion of the ODIHR Opinion was indicated as 15 June, it transpired shortly thereafter that the Ministry of Labour and Social Protection extended the time for completion of work on the Draft. Furthermore, a new version of the Draft was completed and provided to OSCE ODIHR via the OSCE Centre in Astana on 7 July 2009.*

3. *The Opinion contained herein (hereinafter referred to as "the Opinion") has been drafted in response to the above request for assistance and is based on the new version of the Draft provided to OSCE ODIHR on 7 July 2009, constituting Annex 1 hereto.*

4. *It is noteworthy that the OSCE ODIHR previously conducted a Preliminary Opinion on the Legislation of the Republic of Kazakhstan concerning Labour Activity Undertaken by Foreign Citizens on the Territory of the Republic of Kazakhstan, which was issued on 21 June 2007*[1].

II. SCOPE OF REVIEW

5. The scope of the Opinion covers only the above-mentioned Draft, which was submitted for review. Therefore, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing the issue in the Republic of Kazakhstan. Instead, it focuses on migrants' rights established in the Draft and makes some general remarks regarding migration, freedom of movement and other basic rights and freedoms. The Opinion also contains an assessment of the overall structure of the Draft.

6. The Opinion is based on an unofficial translation of the text of the Draft provided by the OSCE Centre in Astana, which was later revised by an OSCE ODIHR translator. Nevertheless, errors from translation may result.

7. In view of the above, the OSCE ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Draft that the OSCE ODIHR may wish to make in the future.

[1] Opinion No: MIG – KAZ/080/2007

III. EXECUTIVE SUMMARY

8. In order to ensure the compliance of the Draft with international standards and obligations to which the Republic of Kazakhstan is signatory and has committed, it is recommended as follows:

A. to review the compatibility of this Draft and other relevant domestic legislation referred to in the Draft with international agreements signed by the Republic of Kazakhstan, in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and certain ILO Conventions. [pars. 27 and 40]

B. to amend the Preamble to include all areas covered by the Draft. [par. 18]

C. to limit this law to trans-border migration and the rights and obligations of foreigners. [par.19]

D. to conduct a complete comparative review of this Draft and of all laws dealing with different aspects of migration and with the respective competences of different State organs prior to the passing of the Draft, to avoid repetitions and incompatibility between related laws. [par. 19]

E. to clarify the legislation referred to in Article 2 and the relationship of different laws dealing with migration issues. [par. 20]

F. in articles referring to other legislation, to state more precisely exactly which law and, if possible, which provision is being referred to. [pars.21, 29, 40 and 51]

G. to use terminology consistently throughout the Draft and include all necessary, correct and internationally consistent definitions in Article 1. [pars. 22, 63 and 64]

H. to review with a view to making more precise the competences of different state bodies in the field of migration processes and their inclusion in the Draft. [pars. 23 and 24]

I. to list the objectives and policies of the Law on Migration and the definition of the term “migration” in the first article of the Draft. [par. 25]

J. to amend Article 4 par. 2 to reflect the principle of the equality of migrants (including foreigners) and Kazakh citizens in line with international agreements ratified by Kazakhstan. [par. 26]

K. to mention specifically which situations Article 54 par. 2 applies to. [par. 29]

L. to review the compatibility of internal settlement quotas (Articles 53 and 55 of the Draft) with Article 12 of the ICCPR and amend relevant provisions accordingly. [par.30]

M. to review the compatibility of exit permit refusals (Articles 58 and 59) with Article 12 of the ICCPR and amend relevant provisions accordingly. [pars. 31 and 32]

N. to clarify or delete Article 59 par.1. [par. 33]

O. to amend Article 59 pars. 4, 6 and 7 so that refusals of exit permits in such circumstances need to be based on court decisions. [par. 34]

P. to include in Article 59 a right to appeal and the obligation for state authorities to conduct periodic reassessments of the circumstances permitting the refusal of an exit permit. [par. 35]

Q. to clarify the term "records" in Article 9 par. 9 and inform the persons concerned of the archiving of their data. [par. 36]

R. to introduce the definition of the term "migrant worker" in the Draft. [par.39]

S. to add provisions on the equality of rights of immigrants and citizens to the Draft with regard to other rights included in the International Covenant on Economic, Social and Cultural rights, such as the right to work, the right to enjoy just and favorable work conditions, and the right to an adequate standard of living. [par. 41]

T. to include the right for migrant workers to found and join trade unions. [par. 42]

U. to amend the Draft so that work permits are issued on the request of workers themselves, not on the request of employers. [par. 44]

V. to ensure that employers who violate employees' rights are prosecuted accordingly under the appropriate criminal provisions. [par. 45]

W. that the Republic of Kazakhstan adopt and ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, as well as the ILO Migration for Employment Convention and the ILO Migrant Workers Convention and bilateral agreements with neighbouring countries on seasonal workers. [par. 46]

X. to amend Article 51 par. 6 to include a clause for exception for cases involving minor or certain past infringements. [par. 49]

Y. to make consistent the contents of Articles 51 and 52 par. 12. [par. 50]

Z. to amend Articles 51 and 52 so that refusals of entry and of residence permits are provided in writing and in a language understood by the person concerned. [par. 51]

AA. to include in the Draft a right to appeal against a refusal of entry (Article 51). [par. 51]

BB. to clarify the right to appeal in Article 52 and specify in that Article which laws regulate such appeals procedures. [par. 51]

CC. to amend pars. 2, 5 and 14 of Article 52 in line with international human rights standards. [pars. 52-56]

DD. to adopt a differentiated approach in Article 63 with regard to arrest for deportation and to include in this Article the right of arrested persons to be informed of the reasons for arrest in a language that they understand. [pars. 57 and 58]

EE. to include in Article 63 a right to appeal against arrest and detention conditions and detainees' rights to legal representation. [par 58]

FF. to include in Article 63 a limitation of the term of detention and specify that such a term of detention must be determined by a court. [par. 58]

GG. to include in Article 63 a clear ban on the collective expulsion of aliens. [par. 58]

HH. to permit stay or stopping of deportation proceedings in the interests of a deportee's basic human rights or for humanitarian reasons, in particular in cases involving victims of trafficking. [pars. 59-61]

II. to amend/delete Articles 1 par. 14, 15 par. 1 (4) and 46 with a view to easing unjustified restrictions on migrants wishing to conduct missionary or other preaching activities. [pars. 64-66 and 68-70]

JJ. to render Article 44 more flexible so as to cover various different types of humanitarian work. [par 67]

KK. to make consistent the time periods in Articles 1 (22) and 1 (24). [par. 71]

LL. to amend Article 1 par. 32 to specify that the Ethnic Repatriate Quota (Oralman quota) provides additional social support to ethnic repatriates falling within this quota. [par. 72]

MM. to amend Article 5 par. 7 to provide free integration/adaptation services for all immigrants. [par. 73]

NN. to amend Article 6 par. 4 to include cases where migrants turned 16 after having entered Kazakhstan. [par. 74]

OO. to make consistent the requirements of different categories of businessmen in Article 25 par. 3 [par. 75]

PP. to amend Article 29 par. 1 so that it is consistent with Kazakhstan laws on marriage and family and so that it covers family reunion with all parents and specifies that "guardianship over under-aged children" implies "legal guardianship". [par. 76]

QQ. to include in Article 29 par. 1 a clause granting priority treatment to humanitarian cases. [par. 77]

RR. to amend or delete Article 29 par. 4 (1) to permit family reunion for immigrants based on political grounds. [par. 78]

SS. to amend Article 30 par. 2 to guarantee equal treatment for citizens and ethnic Kazakh repatriates. [par. 79]

TT. to extend the right to reside in Kazakhstan after termination of circumstances permitting residence rights for family reunion to persons without financial means (Article 30 par. 3). [par. 80]

UU. to render the working procedure for the Commissions for Assignment of the Ethnic Repatriate Status and Inclusion in the Ethnic Repatriate Immigration Quota described in Article 35 and for the Migrant Adaptation and Integration Centres (Article 39) as transparent as possible and include in Article 36 a right to appeal. [pars. 81 and 82]

VV. to clarify the term "justifiable reasons" in Article 40. [par. 83]

WW. to amend Article 41 to provide accommodation for ethnic repatriate (hereinafter "oralman") families until alternate accommodation is found. [par. 84]

XX. to delete the requirement of compulsory medical examination in Article 41 par. 2. [par. 84]

YY. to clarify Article 47 to the effect that requests for asylum can also be made to border police. [par. 85]

ZZ. to specify in Article 64 which court is competent to deal with disputes regarding compliance with the Law on Migration and which court procedures will apply. [par. 86]

AAA. to clarify the future application of the law in Article 65. [par. 87]

BBB. to introduce a period of *vacatio legis* when implementing the Law. [par. 88]

CCC. prior to passing the Draft, to review which existing laws in Kazakhstan need to be amended and ensure the availability of sufficient funds (regulatory and financial impact assessment) and the necessity of secondary regulations to ensure proper implementation. [pars. 89 and 90]

IV. ANALYSIS AND RECOMMENDATIONS

(i) General Remarks on the Freedom of Movement and Other Basic Human Rights Principles

9. Migration cannot take place without freedom of movement. The freedom of movement within a state is a fundamental human right. Article 13 of the UN Declaration of Human Rights[2] states that "Everyone has the right to freedom of movement and residence within the borders of each state". Article 12 of the International Covenant on Civil and Political Rights[3] (hereinafter "the ICCPR") only grants this right to persons "lawfully" residing in a State and permits certain restrictions, but only if they are "provided by law and necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with other rights protected by the Convention". According to both Article 13 of the UN Declaration of Human Rights and Article 12 of the ICCPR, everybody has the right to leave a country, including his/her own.

10. Freedom of movement is also one of the principles that OSCE participating States have committed to protecting in a number of CSCE/OSCE documents (hereinafter referred to as "OSCE documents" and/or "commitments"), starting with the Helsinki Act (1975), where they committed to simplifying and administering flexibly entry and exit procedures and to facilitating the movement of citizens between participating States. The Concluding Document of Vienna (1989) defined freedom of movement as one of the main OSCE

[2] Passed on 10 December 1948

[3] Article 12, of the ICCPR (1966), ratified by Kazakhstan on 24 January 2006, states that:

(1) everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) everyone shall be free to leave any country, including his own.

(3). The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

principles[4], stating also that this freedom would not be subject to arbitrary restrictions not provided for by law or inconsistent with international obligations under UN Law, including the UN Declaration of Human Rights and the ICCPR. This principle was enhanced in the Copenhagen Document (1990), which stated that the freedom of movement may only be restricted if this is necessary to respond to a public need or pursues a legitimate aim and is proportionate to that aim. The Copenhagen Document also included commitments to introducing expeditious entry and visa procedures. Finally, the Moscow Document (1991) includes States' commitments to remove legal and other restrictions on travel within their territories, and with respect to residence for those entitled to permanent residence.

11. In Kazakhstan, the freedom of movement is secured by Article 21 of the Constitution of Kazakhstan[5] (hereinafter "the Constitution"). Article 21 specifies that everyone who has a legal right to stay on the territory of the Republic of Kazakhstan may freely move about on its territory and freely choose a place of residence, except in cases stipulated by law[6]. Article 21 par. 2 guarantees everybody's right to leave the territory of Kazakhstan and Kazakh citizens' right to freely return to the Republic.

12. Since Kazakhstan is a signatory State of the ICCPR, its Constitution and all other legislation must be interpreted in light of the provisions of the ICCPR. This principle is supported by Article 4 par. 3 of the Constitution and Article 2 of the Draft, both of which recognize the priority of international treaties ratified by the Republic of Kazakhstan over domestic laws. This means that any restriction to the freedom of movement must not only be based on law, as stipulated by Article 21 of the Constitution, but must also fulfill the other requirements elaborated in Article 12 of the ICCPR. Furthermore, any provision which is not in compliance with international law shall be inapplicable and the principle enunciated in international law shall be applicable[7]. Aside from fulfilling the requirement of necessity, any restrictions

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[4] Vienna 1989: Questions Relating to Security in Europe: Principles, Par. 20:

"The participating States will respect fully the right of everyone

- to freedom of movement and residence within the borders of each State, and
- to leave any country, including his own, and return to his country."

[5] Constitution of the Republic of Kazakhstan, adopted by referendum on 30 August 1995, last amended on 21 May 2007

[6] Article 21 of the Constitution of Kazakhstan states that:

1. Everyone who has a legal right to stay on the territory of the Republic of Kazakhstan shall have the right to freely move about its territory and freely choose a place of residence except in cases stipulated by law.

2. Everyone shall have the right to leave the territory of the Republic. Citizens of the Republic shall have the right to freely return to the Republic.

[7] See Article 4 par. 3 of the Constitution and Article 2 of the Draft

to the freedom of movement must comply with the principle of proportionality in international law, meaning that they shall be proportionate and strike a fair balance between the public interest and the individual's rights[8].

13. While freedom of movement is a necessary requirement for migration to take place, states are obliged to protect migrants, in particular international migrants, on their territory and ensure that they are able to enjoy basic rights and freedoms. The Constitution of Kazakhstan secures rights and freedoms to everyone on its territory (Articles 1 and 12), the same as Article 4, par. 1 (1) and Article 5, par. 1 (1) of the Draft. The equality of treatment of citizens and non-citizens is a general international law principle – exceptions to this principle must serve a legitimate State objective and be proportionate to the achievement of that objective[9]. The International Covenant on Economic, Social and Cultural Rights[10] (hereinafter "the ICESCR") requires governments to take progressive measures to the extent of available resources to protect the rights of everyone - regardless of citizenship – to a number of rights such as the right to work, just and favourable working conditions, the right to establish and join trade unions[11] and rights covering health, social security, and education[12]. Specific OSCE commitments concerning the rights of migrant workers will be discussed under the Chapter on the Rights of Migrant Workers (see pars. 37-46 *infra*).

14. The Constitution of Kazakhstan guarantees certain rights to everyone residing on its territory, e.g. the right to be free from all forms of discrimination, habeas corpus rights, the right to information and labour rights including the freedom of choice of occupation and profession[13]. However, certain rights granted to everyone by the ICESCR are only provided to citizens of Kazakhstan, such as the right to form associations, the right to minimum wages and social security, protection of health and free medical assistance and free secondary education[14]. These distinctions are further discussed in other sections of the Opinion.

[8] See *Bessenyei v. Hungary*, ECtHR judgment of 21 October 2008, par. 21.

[9] Prevention of discrimination, the rights of non-citizens, Final Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Human Rights Commission, UN Economic and Social Council, 26 May 2003, E/CN.4/Sub.2/2003/23

[10] The ICESCR (1966), ratified by Kazakhstan on 24 January 2006

[11] See Articles 6, 7 and 8 of the ICESCR, see also Article 22 of the ICCPR and the OSCE Moscow Declaration (2001)

[12] See Articles 9, 11-13 and 15 of the ICESCR

[13] See Articles 14, 16 para. 2, 18, para. 3, 20 and 24 of the Constitution

[14] See Articles 23 and 28-30 of the Constitution

15. Given the priority of international agreements over domestic law, the ensuing recommendations are based on the commitments of the OSCE and the above outlined interpretation of certain rights based on the ICCPR and the ICESCR.

16. While the decisions of the European Court of Human Rights ("European Court" or "ECtHR") are not legally binding on Kazakhstan, they represent the leading forum for interpretation of the relevant human rights instruments for most members of the OSCE, and thus constitute significant persuasive authority on the interpretation of fundamental rights and freedoms, notably freedom of movement and rights of individuals threatened with expulsion/deportation[15].

17. During the reading of the Draft, special regard was paid to whether its provisions coincided with international principles and OSCE commitments on gender equality. The lawmakers of Kazakhstan are to be commended on having maintained a strict gender balance in the style and contents of the Draft.

(ii) Relationship of the Draft Law to Other Laws of Kazakhstan

18. The preamble to the Draft states that the "law shall regulate social relations in the field of population migration; define legal, economic and social principles of the migration processes". Since the Draft appears to also deal with a number of other matters, such as labour, citizenship and residence issues, it is advised to amend the preamble to include all issues covered by the Draft.

19. Overall, the Draft appears to deal with a number of matters that are also covered by other laws on citizenship, labor issues, and state entry and exit. This appears to be an unnecessarily broad approach. The competent lawmakers might consider limiting this law to trans-border migration and the rights and obligations of foreigners staying in Kazakhstan, as have other OSCE participating States[16]. Matters relating to citizenship, including the issue of ethnic Kazakh repatriates (*oralmans*) and labor rights (not including however, work permits for foreigners) would appear to be better placed in legislation on citizenship and labor. At the same time, freedom of movement within the territory of Kazakhstan is already laid down in the Constitution (see par. 11 *supra*) and thus does not need to be repeated in a separate law.

[15] Certain aspects of the rights and freedoms covered by the ICCPR and ICESCR, such as freedom of movement, work conditions, right to establish and join trade unions, equality of treatment are mirrored in Articles 4 (prohibition of forced labour/slavery), Article 5 (right to liberty and security), Article 11 (freedom of assembly and association) and Article 14 (freedom from discrimination) of the European Convention on Human Rights (1950) implemented by the ECtHR. Freedom of movement is specifically laid down in Article 2 of Protocol No. 4 to the Convention. The right not to be expelled if there is a threat to the deportee's life or body in the country of destination derives from Articles 2 (right to life) and Articles 3 (freedom from ill-treatment and torture) of the Convention.

[16] States like Austria, Finland, Greece, Iceland, the Netherlands, Norway and Sweden, to name a few, have laws on the entry, status and exit of foreigners but do not have specific legislation regulating internal migration. ,

Exceptional cases where the State may restrict freedom of movement could be included in other legislation covering emergency situations, criminal law, national security, etc. In order to avoid repetition and incompatibilities of different laws, it is recommended that a complete comparative review of this Draft and of all laws dealing with different aspects of migration be undertaken before the Draft is adopted, provided such a review has not already taken place. As part of this review, it is recommended that the competent lawmakers review the provisions in the Draft on citizenship and labor issues, ethnic repatriates and internal movement and consider whether the Draft is indeed the right instrument to be dealing with these issues. Regardless of whether the lawmakers of Kazakhstan choose to maintain the Draft in its current form, the Opinion will now continue with comments on other structural matters.

20. In the interests of transparency and proper implementation of the Draft Law, it is important that users of the law are aware of the complete legal background with regard to migration issues. While Article 2 of the Draft specifies that legislation on migration shall be based on the Constitution and shall consist in the Law on Migration and "other regulatory legal laws", it does not clarify which other laws it is referring to. It is therefore recommended that Article 2 include a specific reference to the other legal acts covering different aspects of migration. Furthermore, the placement of this law in the hierarchy of legal acts is pivotal and recommended to be clarified. That is, Article 2 should specifically state which law takes precedence over other laws in which situations and whether the Law on Migration would function as a *lex specialis* in all issues relating to migration policies and procedures.

21. Throughout the Draft, there are numerous other examples where provisions refer very generally to "law" or "legislation of the Republic of Kazakhstan" without specifying which precise laws or provisions are being referred to[17]. Generally, it is not ideal to incorporate by reference provisions of other legislation because it obliges individuals applying the law to refer to one or more pieces of other legislation to determine the law. If the reference to other legislation is very general and vague, as in the Draft, determining the law becomes very difficult, if not impossible, for users, even legally qualified users. Next to such practical concerns, lawmakers, by including general references to other legislation in the text of a law without specifying which provisions they are referring to, may overlook whether parallel or related legislative provisions are consistent with what is being drafted. In order to avoid such a situation, it is recommended to cite necessary principles and provisions of other legislation in a precise manner in the final version of the Draft and to ensure that the Draft is compliant with them. References to international treaties should also be made more precise, for instance, Article 9 par. 8, which speaks of "the Hague Convention from October 5, 1961" should cite the official name of the Convention (Convention Abolishing the Requirement of Legalisation for Foreign Public Documents). It should be

[17] Examples for this can be found in Article 1, para. 3, Article 5, para. 1 (3), Article 6, paras. 1 and 2, Article 10, para. 1 (8), Article 12, para. 4, Article 15, para. 4, Article 20, para. 1, Article 25, para. 3, Article 26, para. 2, Article 31, para. 2 (2), Article 43, Article 50, Article 58, paras. 7 and 8, Article 52, and Article 63, para. 1.

borne in mind that any future changes to the legislation referred to could lead to changes of the references included in this Draft.

22. Throughout the Draft, it is also recommended to use the same terminology, to avoid confusion and maintain consistency. For example, while Article 3 defines various types of "migration", the titles of chapters 3-8 clearly referring to several types of migration or migrants speak only of "immigration". This inconsistency could be avoided by deleting Article 3. Definitions of all types of migration should also be included in Article 1. At times, the different residence/stay permits issued by authorities need to be clarified (possibly, for the sake of clarity and simplicity, in secondary legislation). In other cases, certain terms included in the Draft have not been defined (e.g. migration card (Article 6, par. 4)). It is recommended to clarify the above inconsistencies and include all appropriate definitions. It is further recommended to review all definitions in Article 1 for their compatibility with definitions recommended by international organizations, such as the UN (e.g. while Article 3 includes tourism and education as examples of migration, these terms generally do not fall under the definition of migration). Also, it was noted that some terms defined in Article 1 of the Draft do not appear again throughout the text of the Draft – it is recommended to delete such "redundant" definitions (e.g. the definitions of "migrators", "emigration" and "emigrants").

23. In particular, it is worth considering whether the competences of the Government and other State organs with regard to migration issues summarized under Chapter 2 should really be part of the Draft or whether it would not be better to include them in the legislation that forms the legal basis for these government organs. In that case, a general provision naming the government bodies responsible for overseeing migration processes and referring to the legislation outlining their powers should replace Articles 7 to 15 of the Draft. A further review of competences attributed to each State organ should be conducted with a view to avoiding an overlap of tasks and ensuring that certain tasks, e.g. the creation of migrant databases, become a common effort coordinated by one body. In cases where the organizational framework and competences of certain offices mentioned in the Draft may not be clear to all users of the law, the Draft should include detailed references to relevant legislation.

24. The exact step-by-step coordination of different state bodies in the field of migration by the Migration Authority should be outlined in an action plan or secondary law. It is recommended to include the drafting and monitoring of implementation of such an action plan or secondary law in the list of competences of the Migration Authority.

25. In the interest of clarity and concision of the Draft, it is also recommended to list the objectives and policies of the Law on Migration (currently Article 4 of the Draft) at the very beginning of the Draft and to include the definition of the term "migration" in this article (this definition is currently in Article 1 par. 4 of the Draft).

26. It is noted that while the rights and freedoms of migrants (including immigrants) are among the principles of the Law on Migration stipulated in Article 4, par. 1 of the Draft, they are not included in the objectives of the Law laid down in Article 4, par. 2. Instead, this provision merely lists "the protection of the rights and freedoms of Kazakh citizens involved in migration processes" as one of the objectives of the law, but does not refer to the rights and freedoms of non-citizens. The equality of citizens and non-citizens is an international law principle that is e.g. laid down in numerous articles of the ICESCR (see par. 13 *supra*). It is recommended to change the wording of Article 4 par. 2 to reflect this principle.

(iii) Compatibility of the Draft Law with Article 12 ICCPR

27. As mentioned above, Article 12 of the ICCPR guarantees the freedom of movement and choice of residence for everybody lawfully on the territory of a State. This freedom is entrenched in Article 21 of the Constitution of Kazakhstan, Article 54 of the Draft and numerous OSCE commitments[18]. The Draft should be reviewed for its compatibility with this and other articles of the ICCPR.

28. Article 54 of the Draft expressly states the above freedom of movement principle, but allows limitations of this freedom in "cases defined by law when it shall be restricted for state security, protection of public order and health of population". This provision must be interpreted in light of Article 12 of the ICCPR, meaning that the restriction must not only be necessary, but also proportionate to the stated aim, thereby striking a proper balance between the individual and the public interest (see par. 12 supra).

29. While Article 54 par. 2 generally protects individuals from forced migration, it also states that forced migration is permissible if established by legislative acts of the Republic of Kazakhstan. In order to ensure that forced migration only occurs in very exceptional circumstances, e.g. natural disasters, major accidents or catastrophes, it would be better to mention specifically which legislation permits such forms of migration and in which situations it applies. This legislation will then also need to be reviewed to ensure that it is compatible with the freedom of movement principle stipulated in Article 21 of the Kazakh Constitution and Article 12 of the ICCPR.

30. It is questionable whether the internal settlement quota regulating internal migration mentioned in Articles 53 and 55 of the Draft is compatible with Article 12 of the ICCPR. If this is indeed a quota only allowing certain people to move and resettle within the country, then such a restriction of freedom of movement would be in violation of Article 12 of the ICCPR. If, on the other hand, this quota is merely another term for a government program supporting resettlement to certain select areas in Kazakhstan, then such a program would not need to be laid down in a law, but rather in an action plan. This action plan

[18] See especially the Concluding Document of Vienna (1989), "Questions relating to Security in Europe", para. 20 and the Moscow Document (1991), para. 33

should then also include more detailed requirements as to the application and selection procedures for persons potentially benefitting from this program.

31. According to Article 58 par. 2 of the Draft, the departure of citizens for permanent residence abroad requires a permit issued by the competent internal affairs body. Such a permit is not required for persons leaving the country temporarily. Since all persons lawfully residing in Kazakhstan are expressly permitted to leave the country according to Article 12 par. 2 of the ICCPR and Article 21 of the Constitution, regardless of whether they are leaving temporarily or permanently, the requirement of obtaining an exit permit prior to departure appears redundant[19]. It is thus recommended to amend Article 58 accordingly and delete all references to exit permits.

32. If not deleted, the practice of issuing exit permits can only be compatible with the above-mentioned freedom of movement principles if it is quite clear in the Draft that individuals leaving Kazakhstan permanently for another state will usually automatically receive exit permits. It should be made very clear in the Draft that exit permits will only be refused in very exceptional cases and only following a prior court order.

33. In the current Draft, exit permits may be temporarily refused under certain conditions listed in Article 59. In its General Comment No. 27 on Freedom of Movement (Article 12)[20], the UN Human Rights Committee stated that such restrictions of the freedom of movement must be based on clear legal grounds and stressed the need that they meet the test of necessity and the requirements of proportionality[21]. The UN Human Rights Committee noted that these conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of "State secrets". It is thus recommended to clarify or delete Article 59 par. 1 stating that a permit may be refused if lodged by a citizen possessing information that is a "state secret or legally protected secret".

34. A number of other conditions for temporary refusal of exit permits appear similarly vague, thereby allowing authorities a wide margin of appreciation when refusing exit (or in this case "exit permits"). In situations such as Article 59 par. 4, which limits a person's right to leave Kazakhstan in cases where he/she "escapes [the] fulfillment of obligations imposed by the court until the fulfillment of the obligations or until achieving consent by parties", the decision of restricting a person's freedom of movement in such a way should be made by a court. Such a restriction would only be necessary and proportionate if exceptionally the competent court sees no other way to ensure fulfillment. The same should apply in the case of Article 59 par. 6 allowing the

[19] A number of OSCE commitments also stress the freedom to exit a country, e.g. the Helsinki Final Act (1975), Co-operation in Humanitarian and Other Fields, Article 1: Human Contacts, par. d, also the Concluding Document of Vienna (1989), Questions relating to Security in Europe, pars. 20 and 21.

[20] UN Human Rights Committee, General Comment No. 27: Freedom of movement (Art.12), 02/11/99

[21] On this point, see also *Bessenyei v. Hungary*, ECtHR judgment of 21 October 2008, par. 21

refusal of exit (or in this case "exit permits") if applicants "consciously forged documents in order to be permitted to depart from Kazakhstan" and in the case of Article 59 par. 7 stating that persons may be prevented from leaving Kazakhstan if they are respondents in civil proceedings, until judgment in the matter has been passed.

35. Considering the importance of the right to freedom of movement, Article 59 of the Draft should include a provision providing individuals with the right to appeal/object against decisions rejecting their request for permission to leave Kazakhstan or simply, prohibiting their exit in case exit permits are abolished as recommended. The provision on appeals should specify the time limit for appeal, the time limit granted to the competent administrative office (presumably the internal affairs department) in which to respond to the appeal, and which legal remedy is open to individuals whose appeals have been rejected. In the case of *Bessenyei v. Hungary*, the ECtHR noted that authorities were required to conduct periodic reassessments of their justification for preventing a person from leaving a country, since restricting this aspect of the freedom of movement over a lengthy period of time could at some point constitute a disproportionate measure. Such a measure would then be in violation of an individual's right to freedom of movement[22]. This requirement to reassess the reasons for preventing a person from leaving the country on a regular basis should also be included in the Draft.

36. Once Kazakh citizens have left the State to permanently reside abroad, their records are kept by the Ministry of Foreign Affairs (Article 9 par. 9). It is not clear what kind of records this refers to, neither the purpose of such storage and processing of data. It is thus recommended to clarify this term in the present Draft and that the persons concerned are informed of the archiving of their data[23].

(iv) Migrant Workers

37. Over the last decade, international human rights law has stipulated numerous rights and freedoms applying specifically to migrant workers. The International Labour Organization (hereinafter "the ILO") has drafted

[22] See *Bessenyei v. Hungary*, ECtHR judgment of 21 October 2008, par. 23. See also *Riener v. Bulgaria*, ECtHR judgment of 23 May 2006, par. 121

[23] In this context, see the UN Guidelines for the regulation of computerized personal data files (A/RES/45/95) of 14 December 1990, in particular Article 3 stating that a file's purpose and its utilization should be specified, legitimate and that, once established, it should receive a certain amount of publicity or be brought to the attention of the person concerned to ensure continued relevance of purpose of the file and avoid inappropriate disclosure and that the personal data are not kept for an excessively long period. Article 4 of the Guidelines further states that "everyone has the right to know whether information concerning him has been processed and to obtain it in an intelligible form without undue delay or expense". Also see the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981.

numerous Conventions protecting the rights of migrant workers[24], which were acknowledged and developed further in certain OSCE commitments[25] and the UN's Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[26].

38. In the above UN Convention, a migrant worker is defined as "a person who is to be engaged, is engaged or has been engaged in a remuneration activity in a State of which he or she is not a national".

39. While the Government of Kazakhstan has committed to the protection of migrant workers in numerous OSCE documents, the term "migrant worker" is not expressly included in the Draft. However, connected terms such as "labor migration" or "foreign workforce" are included in the list of definitions under Article 1. The Draft does not guarantee special rights to migrant workers ("foreign workforce"), but presumably includes foreign migrant workers in the more general group of immigrants (i.e. "aliens or stateless persons who arrived in the Republic of Kazakhstan for temporary and permanent residence"(Article 1 par. 6). In order to clarify the status and rights and obligations of migrant workers in Kazakhstan, it is recommended to include the definition of "migrant worker" in the Draft[27] and to specify any rights and obligations specifically pertaining to that group of persons. Should such a definition already exist in other legislation, then it needs to be ensured that it will be consistent with the definition of "migrant worker" in the Draft. Furthermore, such a definition should specify that migrant workers may only be permitted to work in Kazakhstan if they are at least 18 years of age (this requirement is not included in the "terms for foreign workers" listed in Article 22 of the Draft), to prevent child labour[28]. This requirement should also be introduced to Article 27 par. 4 outlining terms of entry and stay for seasonal workers.

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[24] The main ILO instruments protecting migrant workers are the Convention on Migration for Employment of 1949 (C.97) and the Convention on Migrant Workers (Supplementary Provisions) of 1975 (C.143), also the ILO Multilateral Framework in Labour Migration endorsed in 2006. None of these have been adopted or ratified by the Republic of Kazakhstan.

[25] See the Helsinki Final Act (1975) stipulating equal rights of migrant workers and nationals, reconfirmed by the Concluding Document of Helsinki (1992), and also the Concluding Document of Budapest (1994) which confirmed the condemnation of all OSCE participating states of discriminatory acts against migrant workers

[26] UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted on 18 December 1990, entered into force in 2003. Not adopted or ratified by the Republic of Kazakhstan.

[27] See ODIHR's Preliminary Opinion No. MIG – KAZ/080/2007 on the Legislation of the Republic of Kazakhstan concerning Labour Activity Undertaken by Foreign Citizens on the Territory of the Republic of Kazakhstan (21 June 2007), which also included this recommendation.

[28] See Articles 1 and 32 of the UN Convention on the Rights of the Child (adopted on 20 November 1989), ratified by Kazakhstan on 12 August 1994.

40. Article 5 of the Draft states that immigrants (including foreign migrant workers) shall enjoy the same rights and freedoms as Kazakh citizens. However, while Article 5 par. 3 clarifies that immigrants shall have rights to education, medical, housing rights and social protection as established by the legislation of the Republic of Kazakhstan, it does not expressly stipulate equality between immigrants and Kazakh citizens with regard to these rights. Articles 7, 8, 9 and 10 of the Decree of the President of Kazakhstan on Legal Status of Foreign Citizens in the Republic of Kazakhstan[29] confirm this by stating that only permanent foreign residents are entitled to the same health care, housing rights and social security as residents of Kazakhstan. The rights of temporary foreign residents are stated as being regulated in other (unspecified) legislation of Kazakhstan. It is suggested to review this hitherto unspecified legislation for its compatibility with the principles of equal treatment stipulated in the above ICESCR articles. This review should also include OSCE commitments on migrant workers' rights, in particular those laid down in the Helsinki Final Act (1975) and in the Concluding Document of Helsinki (1992) stipulating equal treatment of migrant workers and nationals with regard to social security and education for children[30] (including supplementary education in the former's language, national culture, history and geography), and the Madrid Document (1983), which stresses the protection of migrant workers and their families' economic, social and cultural rights. At the same time, the above compatibility review should involve a number of ILO conventions ratified by Kazakhstan, e.g. the C87 Freedom of Association and Protection of the Right to Organize Convention (1948), the C111 Discrimination (Employment and Occupation) Convention (1958, and the C157 Maintenance of Social Security Rights Convention (1982).

41. Currently, certain economic and social rights included in the ICESCR are not part of the Draft. It is recommended to add provisions on the equality of rights of immigrants and citizens to this Draft with regard to, e.g. the right to work (Article 6 of the ICESCR) and the right to enjoy just and favorable work conditions (Article 7 of the ICESCR, including fair wages and remuneration, safe and healthy working conditions, equal promotion opportunities and rest, reasonable working hours and leave), as well as the right to an adequate standard of living (Article 11 of the ICESCR) to enhance the protection of immigrants/foreign workers in Kazakhstan[31].

42. It is noted that the right for migrant/foreign workers to establish and join trade unions is also not included in the Draft. Both Article 22 of the ICCPR and

[29] This decree was passed on 19 June 1995 and amended in 1997 and has the power of law in Kazakhstan.

[30] In this context, it should be noted that the Republic of Kazakhstan has also ratified the UN Convention on the Rights of the Child, which in Article 28 specifies that States shall make primary education compulsory and available free for all children (regardless of their background) and shall make secondary education available and accessible to every child. This should also be borne in mind by the Education Authority when implementing its competences in Article 12 of the Draft.

[31] A number of these rights were also included for migrant workers in the Helsinki Final Act (1975)

Article 8 of the ICESCR, as well as Article 2 of the ILO Convention C87 on Freedom of Association and Protection of the Right to Organise[32] (1948) stress that all persons/workers, without distinction, have the right to found and join trade unions of their choice. This is confirmed in OSCE commitments, e.g. the Concluding Document of Helsinki (1992). This right may only be restricted by law and only if necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others (Article 8 of the ICESCR). Allowing migrant/foreign workers to found and join organizations would help protect them from exploitation or arbitrary behavior on the side of their employers and would serve to inform them about their rights in general. It is thus recommended that the right for migrant/foreign workers to found and join trade unions be included in the Draft.

43. Next to including the above provisions, the status of migrant/foreign workers should also be improved by amending the procedure whereby foreigners are permitted to work in Kazakhstan. Currently, the relationship between foreign workers and their employers is one of absolute dependency – the State provides employers with permits to invite foreigners to come and work for them based on annual quotas. Based on such invitation permits, foreign workers may enter Kazakhstan and receive work permits. Since their right to stay and work in Kazakhstan is thus linked to a specific employment position, the loss of this position will automatically result in the loss of the work permit. Foreign workers are then left with two choices – to leave the country or continue to work without a work permit. This only enhances the dependency of foreign workers on their employers. It is thus easy for employers to exploit their foreign workers, especially if they are migrants without a regular status, e.g. by forcing them to work long working hours, denying them rest days, confiscating their passports, refusing to pay salaries and "selling" migrant workers to other employers[33].

44. This situation could be improved if work permits were issued on the request of workers themselves, instead of following an invitation by employers[34]. The annual quotas for foreign workforce would then cover the number of work permits issued to foreign workers per year, not the amount of permits to invite issued to employers every year. The system whereby such work permits could be acquired would need to be made very clear to potential migrant/foreign workers. In addition to the benefits that this new system would have for the domestic labor market, it would also help reduce the number of irregular migrant/foreign workers in Kazakhstan, which would in turn permit the

[32] ILO Convention C87 on Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 and ratified by the Republic of Kazakhstan on 13 December 2000

[33] Examples are taken from the preliminary conclusions of the International Federation for Human Rights' (FIDH) investigative mission to Kazakhstan and Kyrgystan, press release of 22 July 2009

[34] As already suggested in: Elena Tyuryukanova, "Forced Labor in the Russian Federation Today: Irregular Migration and Trafficking in Human Beings", ILO Publication, Geneva, 2005, which focuses on the link between unprotected migrant workers and human trafficking.

Government to have more oversight over the actual number of foreign workers on the labor market per year.

45. At the same time, employers who violate their employees' rights by keeping them in a state of dependency (e.g. by confiscating their passports) and abusing or exploiting them should be prosecuted. It is recommended to ensure that such behavior is covered by the appropriate criminal provisions and that prosecuting authorities recognize the importance of bringing such cases to court in a rapid and effective manner.

46. In order to further guarantee the protection of migrant/foreign workers and their families, it is recommended that the Republic of Kazakhstan adopt and ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and ILO Migration for Employment Convention (Revised) No. 97 of 1949 and ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975. Furthermore, it is recommended that Kazakhstan sign bilateral agreements with neighboring countries on seasonal workers, insofar as such agreements do not exist already, to reduce the number of seasonal workers illegally in Kazakhstan.

(v) Refusal of Entry and Residence, Arrest and Deportation

47. Chapter 10 of the Draft regulates the grounds for rejecting requests to enter Kazakhstan or to obtain residence permits (Articles 51 and 52). Provisions on deportation are to be found under Chapter 15 (Responsibility for violation of the Legislation on Migration of the Republic of Kazakhstan), Article 63.

48. As mentioned above (see par. 13 supra), all persons on the territory of Kazakhstan enjoy certain basic human rights, regardless of their status. The ensuing comments are based on this principle of equal access to basic rights for all.

49. Under Article 51 par. 6, entry may be refused if the applicant violated domestic laws on legal status of aliens, tax, monetary and other laws during a previous stay in Kazakhstan. This means that any violation of a Kazakh law, however small and however long ago, could lead to a permanent ban on entering Kazakhstan again. Since this appears to be a rather harsh measure, it is suggested to differentiate by adding a clause by which the competent authorities will permit entry, on an exceptional basis, if the infringement was

minor[35] (e.g. if it merely entailed a monetary or other administrative fine) and/or if it happened more than 10 years ago[36].

50. Article 51 states that immigrants previously deported from Kazakhstan shall be refused entry until a time period of five years has elapsed. On the other hand, Article 52 par. 12 stipulates that a residence permit may be refused if a person has previously been deported from Kazakhstan, but does not include a time limit in which such a person may again request a residence permit. It is recommended to make the two provisions consistent so that immigrants may obtain a residence permit in Kazakhstan once five years or more have elapsed since the deportation.

51. In the interests of transparency and accountability of government, any refusal of entry (Article 51) or of a residence permit (Article 52 of the Draft) should be provided to the applicant in writing and in a language understood by the person concerned. Also, the individual who was refused entry should have the right to appeal against the decision refusing him/her entry. The right to appeal against the rejection for issuing a residence permit and stateless person identity card as mentioned in Article 52 should be specified by indicating which body/court is responsible for receiving such appeals. Article 52 should also state which laws or codes in Kazakhstan regulate such appeals procedures.

52. Article 52 par. 2 permits the State to refuse/annul a residence permit to persons released from institutions of confinement whose place of permanent residence prior to conviction was outside the Republic of Kazakhstan. It is recommended that an exception be included in this provision for persons released from detention because their detention was considered illegal. Article 52 par. 4 needs to be clarified to specify the exact nature of the procedure that individuals applying for residence permits need to be able to cover financially (presumably this is the procedure for obtaining a residence permit).

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[35] In Sections 18 and 20 of the Icelandic Act on Foreigners No. 96 (15 May 2002), a foreigner will be refused entry if he was imprisoned abroad during the five previous years or if he was sentenced abroad or in Iceland on account of a criminal act that under Icelandic law could be punishable by more than three months' imprisonment. In Sweden, an alien may only be expelled for having been convicted for a crime if he/she was sentenced to punishment more severe than a fine and if on account of the nature of the crime and other circumstances, it may be assumed that he/she will continue his/her criminal activity in the country or the offence is sufficiently serious to justify his/her expulsion (Chapter 8, Section 8 of the Swedish Aliens Act (29 September 2005, last amended 2009).

[36] According to Article 10, par. 1 (5) of the Law on Foreigners in the Republic of Bulgaria (Prom. SG 153/23 December 1998, last amended in 2007), a foreigner previously expelled from the Republic Bulgaria may only be refused entry if his expulsion is less than 10 years ago. In other states, e.g. Switzerland, it is up to the competent national authorities to issue permanent or temporary entry bans, depending on the facts of each individual case (Article 67 of the Federal Law on Foreigners, adopted on 16 December 2005, last amended in 2009). In the Federal Republic of Germany, an entry ban following an expulsion will be limited in time upon motion of the person to be expelled (Section 11 of the German Law on Residence, Employment and Integration of Foreigners on Federal Territory (BGBl. I S. 162, adopted on 25 February 2008, last amended in mid-2009).

53. Article 52 par. 5 permits the State to refuse/ annul a residence permit to drug addicts or individuals having no certificate confirming that they have no diseases produced by an HIV infection, or having a disease that could cause an epidemic on the territory of Kazakhstan. The term "drug-addicted individuals" seems very vague and would need to be defined with greater clarity. In particular, Article 52 par. 5 should specify which substances are considered to be "drugs" for the purpose of this law and as of when a person is considered "addicted" to drugs[37].

54. With regard to HIV-infected persons, it should be noted that the Office of the UN High Commissioner for Human Rights and UNAIDS' *International Guidelines on HIV/AIDS and Human Rights* have stated that "there is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status… Therefore, any restrictions on these rights based on suspected or real HIV status alone […] are discriminatory and cannot be justified by public health concerns".

55. It is thus recommended to delete this part of Article 52 par. 5 referring to diseases produced by an HIV infection and to limit refusals of entry to persons "having a disease that can cause an epidemic on the territory of the Republic of Kazakhstan". Drug addicts and HIV-infected persons should be permitted to obtain residence permits except in those cases where they commit a crime, in which case their danger to others would be documented in a court decision.

56. Article 52 par. 14 states that in case individuals reside outside the Republic of Kazakhstan for more than six months, their request for residence permits may be refused or previously issued residence permits may be annulled. It is assumed that this paragraph is meant to apply only to persons applying for residence permits, since it does not make sense to annul a person's existing residence permit merely because that person was not in Kazakhstan for six months. That would mean that if a person has a bad accident while away from Kazakhstan and his/her injuries take longer than six months to heal, this person will have lost his/her right to live in Kazakhstan. It is thus recommended to amend Article 52 par. 14 so that it only applies to persons applying for residence permits.

57. Article 63 deals with the deportation of irregular migrants, which according to this article will be affected "in accordance with the legislation of the Republic of Kazakhstan". Here, as in the other examples listed above (see par. 15 supra), it would be important to state exactly which law regulates the deportation of irregular migrants. With regard to the arrest of persons who are to be deported from Kazakhstan, it would be worth reviewing whether such an arrest will in all cases be necessary or whether it should only be conducted if

[37] See e.g. the German Law on Residence, Employment and Integration of Foreigners on Federal Territory (ibid), which states under Sections 15, par. 2 (1) and 53 par. 2 that entry will be refused to persons having violated the Law on Narcotic Substances. ,Sections 15 par. 2 (1) and 54 par. 3 state that a person will *usually* be refused entry if he/she cultivates, produces, imports, transports, exports, sells, provides to another or traffics in some other way or does business in narcotics.

there are indications that the person concerned is dangerous or likely to abscond[38].

58. Furthermore, arrests for deportation should be based on an arrest warrant or other decision issued by a court. Article 63 should specify that unless special circumstances apply, only persons over 18 years of age should be detained[39]. Persons arrested under Article 63 should also have the right to be informed about the reasons for their arrest in a language which they understand[40] and be subjected to detention conditions that are compatible with standards of human dignity[41]. They should be able to appeal against their arrest and the conditions of detention[42] and should have access to legal counsel. While Article 63 states that the necessary period of detention before deportation shall be defined by the Government of Kazakhstan, it is recommended that the term of detention, as indeed the necessity to detain, should be determined by a court. Article 63 should also include a limitation to the amount of time an individual may be detained pending deportation[43]. Article 63 should also specify whether an appeal will result in a stay of execution until a final decision is reached. Moreover, it is recommended to include in Article 63 a clear ban on the collective expulsion of aliens[44].

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[38] In Greece, aliens without a permit to stay in Greece shall only be deported under certain circumstances listed in Article 44 of Greek Law No. 2910/2001 of 27 April 2001 (last amended in 2003) on the Entry and Stay of Aliens in Greek Territory and Acquisition of Greek Citizenship by Naturalisation and other Provisions (Official Gazette 91, A'). If there is no danger that the alien may escape, if he/she is not dangerous, or if the competent court does not agree with his/her detention, the alien is given up to 30 days to leave the country.

[39] In Chapter 10, Section 2 of the Swedish Aliens Act (see footnote 36), an alien child may not be detained unless it is probable that entry will be refused immediately, there is a danger that he/she would go into hiding, or supervision is not sufficient. The Slovenian Aliens Act (17 October 2002, last amended in 2007) also includes a specific article on the treatment of illegal aliens who are minors (Article 60).

[40] As required by par. 23.1. of the CSCE Moscow Document (1991) and Article 9, par. 2 of the ICCPR

[41] This is a right granted to everyone, without distinction, by Article 10, par. 1 of the ICCPR

[42] As also required by Article 9 par. 4 of the ICCPR. In Iceland, the state authorities even have a duty to provide guidance to a foreigner in cases involving denial of entry, expulsion and revocation of permits to inform him/her of the right to seek assistance of a lawyer or other representative and his/her right to contact a representative of his/her home country (Section 25 of the Act On Foreigners, No. 96 15, see footnote no. 34).

[43] E.g. Article 25 of the Belgian Law on the Entry, Stay, Residence and Exit of Foreigners (adopted on 15 December 1980, last amended in 2003) permits detention pending deportation for a maximum amount of 4 months. In Sweden, such detention is permitted for a period of up to two months, unless there are exceptional grounds for a longer period (Chapter 10, Section 4 of the Swedish Aliens Act, see footnote 35).

[44] Such a ban is set out in Article 3 of the 4th Protocol to the European Convention on Human Rights (adopted 16 September 1963)

59. Aliens should also not be deported if there is a real risk for their lives or bodily integrity in the country of destination. Article 33 of the UN Convention on the Status of Refugees provides such a "non-refoulment" clause for refugees whose lives or liberty would otherwise be at risk. The UN Convention against Torture applies the principle of non-refoulment to cases where there are substantial grounds for believing that the person in question would be in danger of being subjected to torture (Article 3). Both the UN Human Rights Committee and the ECtHR consider this principle as being inherent in articles prohibiting torture and inhuman and degrading treatment (Article 7 of the ICCPR and Article 3 of the ECHR)[45]. As Kazakhstan is a signatory state of the ICCPR, it is recommended to include a clause in this Draft prohibiting the expulsion of aliens if there are clear indications that they would be at risk of death, torture or ill-treatment in the country of destination.

60. It is further recommended to incorporate in the Draft examples of other cases where, for humanitarian reasons, aliens shall not be deported, for example in the case of minors (if they are in custody of a Kazakh citizen), and in the case of individuals who can prove that they are extremely ill or who are over 70 years of age.

61. In cases involving victims of trafficking, their special circumstances should be taken into consideration by the competent authorities. Such persons should not be deported. Instead, pursuant to Article 7 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime (2000)[46], the Republic of Kazakhstan should consider adopting legislative or other appropriate measures to ensure that victims of trafficking are permitted to remain temporarily or permanently in its territory[47]. Victims of trafficking should also be permitted to seek asylum. Furthermore, OSCE commitments[48] and European standards, which have established that a person who has been trafficked, or is suspected to have been trafficked should never be deported and provided with a 30 day "recovery reflection period", during which time they are provided with services and assistance so as to permit recovery from trauma and provide room to decide on their options[49].

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[45] International Commission of Jurists, *Terrorism and Human Rights*, (Occasional Papers No. 2), April 2002, p. 246. See also *Muminov v. Russia*, ECtHR judgment of 11 December 2008, pars. 85-98; *Soldatenko v. Ukraine*, ECtHR judgment of 23 October 2008, par. 66; *Salah Sheekh v. the Netherlands*, ECtHR judgment of 11 January 2007, par. 135.

[46] Kazakhstan acceded to this Protocol on 30 July 2008.

[47] Article 6 of this Protocol states that States party to the Protocol shall provide for the physical, psychological and social recovery of trafficking victims, in particular by providing housing, counselling, medical, psychological and material assistance and employment, education and training opportunities. See also Article 8 of the Protocol on repatriation of victims of trafficking.

[48] Par 3, Chapter V on Protection and Assistance of the OSCE Action Plan to Combat Trafficking in Human Beings, PC.DEC/557, 24 July, 2003

[49] Article 13, Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.: 197)

(vi) Other issues

62. While the issues discussed above were examples where different matters could be subsumed under more general topics, there were a number of solitary (but no less important) issues which are hereby discussed individually:

63. The definition for refugee under Article 1 par. 1 currently states that refugees are persons "who due to a well-founded fear *became* victims of persecution". It is understood that the provision should read "who due to a well founded fear *of becoming* victims of persecution" for various reasons, meaning that these persons are afraid that they may be persecuted upon returning to a certain country, regardless of whether they have already been persecuted in the past or not[50].

Entry Permits for Missionaries

64. In Article 1 par. 14, the definition of missionary activity should be clarified. As it currently stands, the definition is ambiguous. It appears to be the same as the definition of "missionary work" in Kazakhstan's law "On Freedom of Religion and Religious Organizations". This is problematic because by its terms, this definition covers only those that teach doctrines different from those contemplated by the charter of the inviting organization (a rare enough phenomenon), and even then, it is not clear what objective and thus non-discriminatory ground could be used for monitoring or excluding individuals picked out by this definition. This difficulty was one of the express reasons the Kazakh Parliament gave last year for wanting to change the definition of missionary activity in the above Law on Freedom of Religion and Religious Organizations.

65. Even if this problem were solved, the overall aim of defining missionary activity so as to be able to subject it to special monitoring and to make it a ground for special regulation is problematic. If this definition were to suggest that missionary activities as such may be subjected to special burdens, it would run afoul of OSCE commitments that facilitate the freer and wider dissemination of information of all kinds;[51] that protect rights to import and disseminate religious publications and materials;[52] that protect freedom of speech and the right to disseminate information;[53] and that allow believers, religious faiths and their representatives to establish and maintain direct personal contacts and communications with each other.[54]. It is thus

[50] This coincides with the definition of refugee in the UN Convention Relating to the Status of Refugees (1951)

[51] Helsinki Final Act, Co-operation in Other Fields, Information.

[52] *See* the Concluding Document of Vienna (1989), Principles 16.9, 16.10.

[53] *See*, e.g., the Concluding Document of Copenhagen (1990), Principles 9.1, 10.1 and 10.2,

[54] See the Concluding Document of Vienna (1989), Co-operation in Other Fields, para. 32..

recommended to eliminate the above unclarities in the definition of missionary activity.[55]

66. Article 15 par. 1 (4) states that local executive agencies in oblasts shall keep records of immigrants involved in missionary activities or otherwise engaged in preaching activities. This could be interpreted as a discriminatory practice towards a certain group of immigrants, as there does not appear to be an objective justification for keeping records of missionaries and not of other immigrants merely because they are missionaries or otherwise engaged in preaching activities (and not because they pose a concrete threat to the State and people of Kazakhstan). Furthermore, it is not clear what kind of records this refers to, neither the purpose of such storage and processing of data. It is recommended that the government of Kazakhstan abstain from keeping records of certain groups of immigrants and thus to delete paragraph 1 (4) of Article 15.

67. Article 44 lists different categories of "immigrants for humanitarian reasons", namely missionaries, volunteers and immigrants arriving to offer charity, humanitarian aid and provide grants. These three categories appear to be unnecessarily rigid, as they do not allow for cases where immigrants fulfill several of these categories simultaneously (e.g. an immigrant can arrive as a missionary and with the purpose of offering charity) or cases where religious personnel enter the country for purposes other than missionary work or the specified educational, health care, or social support purposes. Article 44 should be rendered more flexible, so as to also cover other forms of humanitarian work, e.g. part-time work, remunerated volunteer work or volunteer work that covers other areas than "education, healthcare and social support" (Article 44 par. 2).

68. In a related context, Article 46 only permits the entry into Kazakhstan of missionaries whose request for entry is supported by an application from a religious association registered in Kazakhstan and following an opinion letter from "an authorized body on relations with religious associations". The first requirement appears to unduly restrict the entry of new religious groups intending to conduct missionary activities. This is particularly problematic, both because acquiring registration is not always as easy as it should be[56] and because some groups may object as a matter of conscience to registration with the State. It is unclear why their entry should depend on the approval of a registered legal entity, whether of the same faith group as the missionary or otherwise. Such an approach defies the principle of religious neutrality that should be the foundation of each democratic state's immigration policy.

[55] In relation to this and the following two paragraphs, see also Comments on the Draft Law of the Republic of Kazakhstan on Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Issues of Religious Freedom and Religious Organizations, prepared by the Prepared by the OSCE/ODIHR Advisory Council on Freedom of Religion or Belief and issued on 10 June 2008.

[56] See the Concluding Document of Vienna, Principle 16.3

69. Furthermore, the requirement of an opinion letter from an authorized body appears unnecessary. The wording in Article 46 is too vague to prevent potential abuse from the side of authorities. Article 46 does not define this "authorized body" and it remains unclear whether it is a religious body or an executive body and if it is a governmental body, how it is insulated from undue religious advice and influence. Moreover, the legislation does not specify which standards this body will apply when preparing its opinion letter (including such information as the time limit within which such an opinion letter should be submitted and whether and on what grounds its contents can be appealed). It is recommended to amend Article 46 to ensure that the entry of individuals for missionary activities will not be unduly restricted by other religious groups or executive bodies.

70. Finally, Article 46(2) appears to indicate that a stay permit for a missionary may be extended for no more than one year after the initial entry permit if there is an opinion letter from the above authorized body. The provision should make it clear that the stay permit cannot be extended for more than one year *at a time*. It is easily conceivable that a missionary may become a longer term resident. The draft law should not put a two year maximum on length of stay in cases where there is no objective non-religious ground for not letting an individual stay for a longer period of time

71. In Article 1 par. 22 of the Draft, permits for inviting foreign workforce are issued for no more than one year. On the other hand, Article 1 (24) states that foreign worker employment permits are issued for no more than three years. It is recommended to synchronize the above time periods, to avoid a situation where a foreign worker continues to work based on a work permit while his invitation period has long expired.

72. Article 1 par. 32 defining the Ethnic Repatriate Immigration quota (Oralman quota) as a quota to benefit social support is not quite correct, since the government of Kazakhstan also provides social support to ethnic repatriates not falling within this quota. It would be more correct to state that the quota provides "additional social support" to families falling within the quota, as rightly stated in Article 36 par. 3 of the Draft.

73. In line with OSCE commitments on the integration of migrants[57], it is recommended to provide free integration/adaptation services for immigrants as well, not only for ethnic repatriates (oralmans), as stated in Article 5 par. 7 of the Draft.

74. Article 6 par. 4 of the Draft states each immigrant having reached the age of 16 shall receive a migration card upon entry into Kazakhstan. It is recommended to extend this clause to also cover persons who turned 16 *after* having entered Kazakhstan.

[57] See Section 37 of the Concluding Document of Helsinki (1992) and Section 31 of the Concluding Doucment of Budapest (1994)

75. According to Article 25 par. 3, business immigrants need to be of age to obtain an entry visa (investor permit), but this requirement is not extended to private business immigrants from countries that concluded visa-free entry and stay agreements with Kazakhstan. There appears to be no objective reason to apply an age limit to one category of investors but not to the other. The requirements of both categories of business immigrants should thus be made consistent. Also, Article 25 is inconsistent in that it supposedly regulates the terms of entry for business-immigrants, but in pars. 5 and 6 only specifies the terms of entry of business-immigrants from countries having entered into visa-free entry and stay agreements with the Republic of Kazakhstan (ethnic Kazakhs, nationals and others), but not the terms of entry of business-immigrants from other countries. It is recommended to add a clause clarifying the terms of entry for business-immigrants from countries that have not entered into visa-free entry and stay agreements with the Republic of Kazakhstan.

Entry and Residence Permits for Family Reunion

76. In Article 29 par. 1 on family reunion, the definition of which persons belong to a family should be made consistent with the definition of family in the Kazakhstan laws on marriage and family (see Article 1 par. 9, which includes a reference to this legislation). It is also not clear why parents of sponsors applying for family reunion may only be allowed into Kazakhstan for this purpose if they are *single* parents above 65 depending on the sponsor. It is conceivable that the parents of a sponsor are still married to each other and still depend completely on the sponsor because both parents are old and infirm. It is recommended to generally allow family reunion for parents dependant on the sponsor, with no limitations. Article 29 should generally specify throughout that "guardianship over under-aged children" implies "legal guardianship", to avoid misuse. Also, the sponsor should be obliged to submit documentation of such legal guardianship when applying for family reunion under Article 30.

77. It is also recommended to add a clause to Article 29 par. 1 stipulating that certain humanitarian cases should be given priority treatment in family reunion proceedings (according to the Helsinki Final Act (1975), such priority treatment is warranted if the persons concerned are ill or old).

78. It is not clear why Article 29 par. 5[58] (1) does not permit family reunion for immigrants for political purposes, who in Article 45 are defined as refugees and asylum seekers. Perhaps this article signifies that family reunion is not permitted for as long as recognition proceedings are underway. Generally barring refugees and asylum seekers from reuniting with their families is not compatible with international standards promoting family reunion for refugee families[59] (indeed, the EU Council's Directive 2003/86/EC on the right to

[58] In the draft, this provision is under Article 29 par. 4, but since there is already a paragraph 4, it was assumed that this is a typographical error and that the correct numbering is Article 29 par. 5.

[59] See James C. Hathaway: The Rights of Refugees under International Law, Cambridge University Press, New York, 2005, p. 535. See also OSCE participating states' commitments to family reunion

family reunification (2003) even states that refugee families should enjoy more favorable conditions in exercising their right to family reunion due to the fact that they were forced to leave their country of origin (preamble (8) and Chapter V)). Article 29 par. 5 should thus be amended or deleted.

79. According to Article 30, par. 2, all sponsors applying for family reunion shall provide confirmation of sufficient financial means to support family members for whom they are requesting entry for family reunion, confirm that their housing is up to standard, and have medical insurance to cover all risks for him/herself and family members. This requirement does not apply if the sponsors are ethnic repatriates (oralmans). While it is understandable that oralmans, being ethnic Kazakh repatriates, receive advantageous treatment here, it is not understandable why such treatment is not also extended to Kazakh citizens. It is recommended to amend Article 30 par. 2 accordingly.

80. Article 30 par. 3 states that in case of termination of circumstances necessary for issuing a permit for family reunion, immigrants with the right to reside in Kazakhstan for family reunion purposes may extend this right for up to six months, provided they can confirm that they have the necessary financial means to support themselves for this period. However, in cases where such financial means are not existent, it appears overly harsh for persons who lost a family member or divorced from their spouses to immediately lose their right to remain in Kazakhstan. It is recommended that also persons without financial means be permitted to remain in Kazakhstan for a certain period after the above event, so that they can adapt to the new circumstances.

81. Article 35 describes the establishment of Commissions for Assignment of the Ethnic Repatriate Status and Inclusion in the Ethnic Repatriate Immigration Quota in oblasts and the cities of Astana and Almaty. It gives a basic framework as to the competences and constitution of these commissions and states that the Migration Authority will draft a working procedure for these commissions. This procedure should be made as transparent as possible by including provisions on time limits, how many members are needed to have a decision-making quorum, and, most importantly, a detailed description of the criteria for including applicants in the ethnic repatriate immigration quota. Similar considerations apply with regard to the procedures to be established by the Migration Authority for the Migrant Adaptation and Integration Centres and for providing ethnic repatriates with integration services according to Article 39.

82. Article 36 regulating the procedure for inclusion in the ethnic repatriate immigration quota should also include a right to appeal for persons whose application for inclusion was rejected.

83. According to Article 40, ethnic repatriates (oralmans) shall maintain the official status of ethnic repatriates until they acquire Kazakh citizenship. If

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within their territories in the Helsinki Final Act (1975) and the Concluding Document of Madrid (1983)

they do not acquire Kazakh citizenship within a period of two years from the moment of acquiring official status of ethnic repatriates and do not have justifiable reasons for this lapse, they shall lose the ethnic repatriate status and may not prolong it. In order to protect oralman applicants who are not able to acquire citizenship through no fault of their own, it is recommended to specify in Article 40 the "justifiable reasons" for not acquiring citizenship.

84. Article 41 stipulates that oralmans referred to the Migrant Adaptation and Integration Centre may stay there for a period of three days and shall leave this establishment after the expiry of this period. However, this provision does not specify what happens if at the end of three days, certain oralman families have not been able to find appropriate accommodation. It is recommended to amend this provision to read "may stay for a period of three days or until alternate accommodation has been found". Article 41 should also mention whether oralmans who have not yet acquired citizenship are permitted to work in Kazakhstan and thus earn a living to support themselves and their families. Finally, it is recommended to amend Article 41 par. 2 (2) requiring oralmans to submit to medical examination and treatment if required by a public health agency – the access to medical examination and treatment should be a right, not an obligation.

85. Article 47 foresees that requests for political asylum may be made to migration authorities and foreign ministries of the Republic of Kazakhstan. Since asylum seekers could conceivably also ask for asylum at the country borders, it is recommended to clarify that requests for asylum may also be made to border police, who will then pass the requests on to the competent migration authority.

86. Article 64 on the settlement of disputes should clarify which court is competent to deal with disputes regarding compliance with the Law on Migration and which court procedures will apply.

(vii) Transitory provisions

87. Article 65 is meant to provide procedures for the application of the future Law on Migration. The second sentence of this provision states that with regard to "relations arising before [the Law] entered into force", the Law shall apply to "rights and responsibilities that arose after [the Law] came into effect". The meaning and effects of this part of the provision should be clarified.

88. When determining the date when the Law on Migration shall enter into effect, it is recommended to include a period of *vacatio legis*, meaning the deferment of the entry into force of a law, to help all offices and individuals familiarize themselves with circumstances changed by the law. *Vacatio legis* also ensures that the respective offices make all necessary preparations and draft all accompanying secondary legislation required.

89. So far, Article 66 on the procedures for the enactment of the Law states that the existing Law on Migration shall expire once the Draft has entered into

force. Before passing the final draft of the Law, the legislator should undertake a careful review to ascertain whether the Law will result in any amendments to other existing laws or secondary legislation in Kazakhstan.

90. Finally, it is recommended that prior to passing the Draft, the availability of sufficient funds to implement the Law on Migration be borne in mind. It is further recommended that in order to prevent the Law from being implemented inconsistently or arbitrarily, secondary regulations are ready at the time when the Law will acquire effect, in particular as regards certain articles of concern which are the subject of this Opinion.

[END OF TEXT]