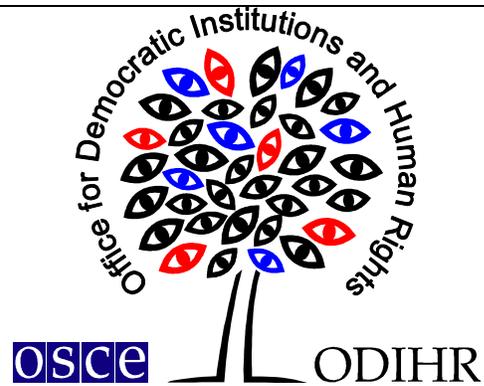


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## OPINION

# ON THE DRAFT LAW OF THE REPUBLIC OF KAZAKHSTAN ON THE REGULATION OF MIGRATION PROCESSES

**Based on an unofficial English translation of the draft Law provided by the  
OSCE Centre in Astana**

*This Opinion has benefited from contributions made by Ms. Elena Tiuriukanova,  
Director of the Centre for Migration Studies, Moscow, Russian Federation*

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**1. INTRODUCTION**

1. *On 21 February 2011, the Deputy Minister of Labour and Social Protection of the Republic of Kazakhstan sent a letter to the OSCE Centre in Astana, in which he informed the OSCE Centre that his Ministry had formed an inter-departmental working group to improve national legislation and labour migration mechanisms in Kazakhstan. The draft Law on Migration of Population was being considered by the Parliament. The Deputy Minister asked the OSCE Centre to conduct expert assistance and provide recommendations on the above-mentioned draft Law.*
2. *On 11 March 2011, the OSCE Centre in Astana forwarded an English translation of the Minister's letter and of a revised version of the draft Law, now titled draft Law on the Regulation of Migration Processes (hereinafter "the draft Law"). This version already included recent comments and additions provided by the Parliament. ODIHR was asked to use this latest version of the draft Law as the basis for its expertise.*
3. *This Opinion is provided in response to the above request.*

**2. SCOPE OF REVIEW**

4. The scope of the Opinion covers only the above-mentioned draft Law, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of all available framework legislation governing migration processes in Kazakhstan.
5. The Opinion raises key issues and indicates areas of concern. The ensuing recommendations are based on international freedom of movement and human rights standards and good practices, as found in the international agreements and commitments ratified and entered into by the Republic of Kazakhstan. The Opinion also reflects the contents of previous OSCE/ODIHR reviews on previous versions of the draft Law, notably an Opinion on the draft Law of Migration of Population issued on 24 September 2009<sup>1</sup> (hereinafter "ODIHR's 2009 Opinion").
6. This Opinion is based on an unofficial translation of the draft Law provided by the OSCE Centre in Astana. Errors from translation may result.
7. Furthermore, it has been noted that the numbering of provisions in the draft Law is not always coherent.<sup>2</sup> However, to avoid confusion, the OSCE/ODIHR has maintained the current numbering of provisions.
8. 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 Law or related legislation that the OSCE/ODIHR may wish to make in the future.

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<sup>1</sup> OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, opinion number MIG – KAZ/137/2009.

<sup>2</sup> For example, in the current draft Law, Article 4 is followed by Article 8, while Articles 5-7 are placed between Article 16 and 17.

### **3. EXECUTIVE SUMMARY**

9. It has been noted that since ODIHR's 2009 Opinion, a number of issues raised previously have been changed in the current draft Law. At the same time, there are other issues that have not benefited from such improvement, and that would need further amendments. The changes proposed in this Opinion aim at ensuring that this important piece of legislation will provide a substantial contribution to the regulation of migration and the rights of migrants. Bearing this in mind, it is recommended as follows:

#### ***3.1 Key Recommendations***

- A. to consider limiting the scope of the draft Law to trans-border migration and the rights and obligations of foreigners, draft a separate law for ethnic Kazakhs (oralmans) and exclude internal migrants and exit permits for citizens from the scope of the draft Law; [pars 18-22]
- B. to include in the draft Law specific references to other legislation dealing with migration issues, as well as to concrete circumstances in which other legislation may take precedence over the draft Law; [pars 25-26]
- C. to clarify the nature and status of the Migration Authority in Article 9; [par 43]
- D. to allow immigration for the purposes of family reunion for family members of all categories of immigrants; [par 76]
- E. to delete all references to exit permits throughout the draft Law; [pars 22, 48 and 110]
- F. to specify in detail the liability and legal consequences deriving from each action and behavior; [pars 111-112)

#### ***3.2 Additional Recommendations***

- G. to amend the Preamble to include all relevant matters covered by the draft Law and specify that the Law on Refugees covers all matters pertaining to refugees and asylum seekers; [pars 17 and 18]
- H. to expand the list of objectives of the state migration policies under Article 4; [par 23]
- I. to amend Article 1 as follows:
  - 1) Organize the list of definitions by topic or alphabetical order; [par 28]
  - 2) Delete "labour migration" (par 2) from the list of terms; [par 29]
  - 3) Differentiate between "migration" and "immigration" and adopt such definitions consistently throughout the draft Law; [par 30]

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- 4) Change the terms “irregular migration” (par 3) and “irregular migrant” (par 4) to indicate that they speak of irregular or illegal immigration; [par 31]
  - 5) Develop a more concise definition of “migration” under par 8 and of “migrant” under par 10; [par 32]
  - 6) Delete the term “migrator” under par 13; [par 33]
  - 7) Eliminate lack of clarity in the definition of “missionary activity” under par 14; [par 35]
  - 8) Adapt the definitions of “internal migration” (par 25) and “internal migrant” (26) so that they are consistent; [par 36]
  - 9) Include definitions of aliens, stateless persons, foreign nationals, temporary and permanent residence, and migration card; [par 37]
  - 10) Integrate definitions of foreign workers, business immigrants, and seasonal workers (currently in Article 22) while taking into consideration the UN Convention on the Protection of Rights of All Migrants Workers and Members of their Families; [pars 38-39]
- J. to clarify the Government’s role under pars 6 and 8 in setting up procedures on stay and exit and citizen registration; [par 41]
- K. to transfer the competences of the Migration Authority from Article 6 to Article 9; [par 42]
- L. to list the actual titles of the public health, education and national security authorities described in Articles 12-14; [par 44]
- M. to clarify the nature of records kept on citizens residing outside Kazakhstan under Article 10 par 7; [par 45]
- N. to amend Article 11 as follows:
- 1) Distinguish between the roles of the Ministry of Foreign Affairs and the bodies of the interior with regard to entry permits for immigrants; [par 46]
  - 2) Avoid overlaps with the Migration Authority with regard to issuing exit permits to immigrants; [par 47]
- O. to establish one central database for all bodies dealing with migration issues; [par 49]
- P. to include in Article 15 the competence of courts to decide on legal disputes arising out of the draft Law; [par 50]
- Q. to clarify all types of assistance offered to immigrants under Article 16; [par 51]
- R. to ensure the coordination of central and local executive authorities with regard to the running of immigrant and oralman adaptation centres; [par 52]

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- S. to place Article 3 on different types of immigration at the beginning of Part 2 of the draft Law on immigration; [par 53]
- T. to amend Article 5 as follows:
  - 1) Specify in detail in which situations the rights and obligations of immigrants and citizens of Kazakhstan are not the same; [par 54]
  - 2) Ensure that, as far as possible, immigrants are entitled to the same health care, education, social assistance and housing rights as Kazakhstani citizens; [pars 55-56]
  - 3) Include a provision on equality between immigrants and citizens as regards the right to work, just and favourable working conditions, and the right to an adequate standard of living; [pars 57 and 68]
  - 4) Make sure that integration and adaptation services are free for all immigrants, not only oralmans; [par 58]
- U. to extend the period of registration (Article 6 par 5) for immigrants and specify what the consequences of delayed registration will be; [pars 59-60]
- V. to clarify the title of Article 7 (currently “non-immigrant individuals”) [par 61]
- W. to allow educational immigrants to leave and return to for as long as their stay permit is valid; [par 63]
- X. to restructure the contents of Article 22; [par 64]
- Y. to guarantee that delayed registration of legal entities by business immigrants will only lead to voluntary exit or deportation as a last resort; [par 67]
- Z. to include the right of foreign workers to found and join trade unions in the draft Law; [par 69]
- AA. to add to the draft Law the requirement for the competent body under Chapter 2 to inform foreign workers of their rights and responsibilities in a language that they understand; [par 70]
- BB. to sign and ratify the UN Convention on the Protection of Rights of All Migrants Workers and Members of their Families and relevant ILO Conventions; [par 71]
- CC. to amend Article 32 as follows:
  - 1) Foresee longer, possibly permanent residence permits for persons arriving in Kazakhstan for family reunion who are sponsored by citizens or persons with permanent residency; [par 73]
  - 2) Ensure that all family members mentioned in this provision may apply for residence permits; [par 74]
  - 3) Specify the legal nature of guardianship over children; [par 75]

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- 4) Allow for priority procedures in special humanitarian cases; [par 75]
- DD. to ensure that in cases of hardship, immigrants will be permitted to stay in Kazakhstan longer than six months or permanently if circumstances for issuing temporary permits under Article 33 cease to apply; [par 77]
- EE. to include in Article 34 (on the rights and responsibilities of immigrants for family reunion purposes) the right to general human rights and freedoms; [par 78]
- FF. to amend Article 39 as follows:
- 1) Clarify under Article 39 the criteria that local executive bodies apply when deciding whether to accept applications for inclusion in the oralman quota; [par 80]
  - 2) Specify in par 11 that it involves a final decision on inclusion in the oralman quota; [par 81]
- GG. to amend Article 47 as follows:
- 1) Indicate that oralmans have, as far as possible, the same rights and freedoms as citizens of Kazakhstan; [par 82]
  - 2) Delete the obligation for oralmans to undergo medical examination or treatment upon request of public health agencies; [par 82]
  - 3) Ensure that oralmans may stay in migration and adaptation centres for longer than three days if necessary to find alternative accommodation; [par 83]
- HH. to amend Article 50 as follows:
- 1) Allow missionaries to reside in Kazakhstan for longer than six months, with the possibility of further extension; [par 85]
  - 2) Facilitate the entry of individuals for missionary activities; [pars 86-87]
- II. to delete all references to “immigrants for political purposes” from the draft Law; [par 88]
- JJ. to amend Article 54 as follows:
- 1) Ensure that exceptionally, individuals previously having violated aliens, tax, monetary or other laws may enter Kazakhstan if they were minors at the time or if the act was committed more than 10 years ago; [par 90]
  - 2) Delete the provision on rejecting entry permits for persons with HIV/AIDS or other sexually transmitted diseases; [par 91]
- KK. to include in the draft Law a provision on how to apply for a permanent residence permit; [par 92]
- LL. to amend Article 55 as follows:

- 1) Delete references to refusal of permanent residence if individuals have HIV/AIDS or other sexually transmitted diseases; [par 91]
  - 2) Include in par 2 the possibility to exceptionally grant residence permits to persons having been confined illegally; [par 93]
  - 3) Clarify the meaning of par 4; [par 94]
  - 4) Limit par 13 to requests for residence permits; [par 95]
- MM. to ensure that refusals of entry or residence permits are provided in writing and in a language understood by the person concerned, and include detailed references to the right to appeal; [par 96]
- NN. to clarify the meaning and purpose of Article 62 par 8; [par 107]
- OO. to expand Article 65 par 3 so that it can be applied in a more flexible manner; [par 98] and
- PP. to amend Article 67 as follows:
- 1) Specify which law regulates deportation of foreigners or stateless persons; [par 97]
  - 2) Ensure that courts check the necessity to arrest illegal immigrants prior to deporting them and that only persons over 18 may be detained; [par 99]
  - 3) Guarantee that persons arrested shall have the right to be informed of reasons for their arrest in a language that they understand and that their detention conditions are compatible with international standards on human dignity; [par 100]
  - 4) Persons arrested should have the right to appeal against their arrest and access to legal counsel; any appeal should stay the execution of the expulsion decision; [par 100]
  - 5) The term of detention should be specified by court and a limit to detention prior to deportation should be included in the draft Law, as should a ban on collective expulsions; [par 101] and
  - 6) Include in this provision clauses prohibiting deportation if individuals are in danger of life or bodily integrity in destination country, for humanitarian reasons (minors, sick, or elderly persons), or in cases involving victims of human trafficking; [pars 102-104].

#### **4. ANALYSIS AND RECOMMENDATIONS**

##### **4.1 The Freedom of Movement and Other Basic Human Rights Principles**

10. At the outset, it is reiterated that the current draft Law includes the regulation of several types of movement of peoples, namely immigration, repatriation of

ethnic Kazakhs (hereinafter “oralmans”), internal migration, and the exit and re-entry of Kazakhstani citizens.

11. Essentially, all of these matters touch upon each person’s freedom of movement. Within a state, this freedom is protected by both Article 13 of the Universal Declaration of Human Rights<sup>3</sup> and Article 12 of the International Covenant on Civil and Political Rights<sup>4</sup> (hereinafter “the ICCPR”). Article 12 of the ICCPR specifies that this right only applies if a person is “lawfully” residing in a State and permits the limitation of this right if it is based on law and necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and if this limitation is consistent with other rights protected by the Covenant. Both Article 13 of the UN Declaration of Human Rights and Article 12 of the ICCPR grant everybody the right to leave a country, including his/her own, and the right to return to/enter his/her country.
12. OSCE participating States have committed to protect the right to freedom of movement within a country, and the right to leave and return to one’s country.<sup>5</sup> Restrictions of this right shall constitute very rare exceptions and are only considered necessary if imposed in response to a specific public need, if they pursue a legitimate aim and are proportionate to that aim and not abused or applied in an arbitrary manner.<sup>6</sup> Numerous OSCE Commitments also aim to facilitate freer movement in the OSCE region, focusing mostly on family ties and reunification.<sup>7</sup>
13. In Kazakhstan, the freedom of movement is secured by Article 21 of the Constitution of Kazakhstan<sup>8</sup> (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<sup>9</sup>. Article 21 par 2 guarantees everybody’s right to leave the territory of Kazakhstan and Kazakh citizens’ right to freely return to the Republic.
14. OSCE participating States have committed to removing all legal and other restrictions for their nationals and foreigners travelling within their territories,

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<sup>3</sup> The Universal Declaration of Human Rights, adopted and proclaimed by the UN General Assembly on 10 December 1948.

<sup>4</sup> The International Covenant on Civil and Political Rights, adopted by UN General Assembly resolution 2200A (XXI) on 16 December 1966.

<sup>5</sup> See the Concluding Document of Vienna, (Third Follow-Up Meeting, Vienna, 15 January 1989), Questions Relating to Security in Europe: Principles, par 20.

<sup>6</sup> See the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 19 June 1990, par 9.5.

<sup>7</sup> See the Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975, Cooperation in Humanitarian and Other Fields, 1 a) and b), and the Concluding Documents of Madrid (Second Follow-Up Meeting, Madrid, 6 September 1983), Cooperation in Humanitarian and Other Fields, and of Vienna, Cooperation in Humanitarian and Other Fields, par 6.

<sup>8</sup> Constitution of the Republic of Kazakhstan, adopted by referendum on 30 August 1995, last amended in 2007

<sup>9</sup> 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.

and with respect to residence for persons entitled to permanent residence. Restrictions justified for military, safety, ecological and other legitimate government interests shall be kept to a minimum.<sup>10</sup> OSCE participating States have also undertaken to improve arrangements to provide citizens of one OSCE participating State temporarily on the territory of another with effective consular, legal and medical assistance.<sup>11</sup>

15. With regard to equal treatment of foreigners or immigrants to citizens of a country, the International Covenant on Economic, Social and Cultural Rights<sup>12</sup> (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<sup>13</sup> and rights covering health, social security, and education<sup>14</sup>. This is reflected in the Constitution of Kazakhstan, which secures rights and freedoms to everyone on its territory (Articles 1 and 12). 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<sup>15</sup>.
16. Over the last decades, international human rights law has stipulated numerous rights and freedoms applying specifically to migrant workers. The International Labour Organization (hereinafter “the ILO”) has drafted numerous Conventions protecting the rights of migrant workers<sup>16</sup>, which were acknowledged and developed further in certain OSCE commitments<sup>17</sup> and in

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<sup>10</sup> See the Document of the Moscow Meeting of the Conference of the Human Dimension of the CSCE, Moscow, 3 October 1991, par 33, which also states that restrictions to the freedom of movement between OSCE participating States and residence for people entitled to permanent residence shall also be in accordance with national laws, consistent with CSCE/OSCE commitments, and international human rights obligations.

<sup>11</sup> See the Concluding Document of Vienna (1989), Questions Relating to Security in Europe: Principles, par 23.

<sup>12</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, and ratified by Kazakhstan on 24 January 2006

<sup>13</sup> See Articles 6, 7 and 8 of the ICESCR, see also Article 22 of the ICCPR.

<sup>14</sup> See Articles 9, 11-13 and 15 of the ICESCR.

<sup>15</sup> 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.

<sup>16</sup> The main ILO instruments protecting migrant workers are the C97 Migration for Employment Convention, adopted by the General Conference of the ILO on 8 June 1949 and the C143 Convention on Migrant Workers (Supplementary Provisions), adopted on 4 June 1975, also the ILO Multilateral Framework in Labour Migration endorsed in 2006. None of the ILO Conventions have been adopted or ratified by the Republic of Kazakhstan.

<sup>17</sup> See the Helsinki Final Act (1975), Cooperation in Humanitarian and Other Fields, 1 d), see also the Concluding Document of the CSCE Summit in Helsinki, 9-10 July 1992, VI. The Human Dimension, pars 36-38, and the Concluding Document of the CSCE Summit in Budapest, 5-6 December 1994, VIII. The Human Dimension, pars 28-31, which confirmed the condemnation of all OSCE participating states of discriminatory acts against migrant workers.

the UN's Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>18</sup>.

#### **4.2 General Comments on the Scope of the draft Law**

17. The preamble to the draft Law states that the “law shall regulate social relations in the field of population migration; define legal, economic and social principles of the migration processes”. On the one hand, it is positive that the preamble covers goals, objectives, basic principles and directions of migration regulation (or migration policy) applied to a broad variety of migration types (flows). On the other hand, the terminology used is quite vague and limited, e.g. it is not clear what “social relations” means, and the draft Law certainly goes much further than defining principles of migration processes. The preamble thus does not properly reflect all aspects covered by the draft Law, such as labour, citizenship and residence issues. It is advised to amend the preamble to include all relevant matters covered by the draft Law.

##### ***4.2.1 Issues Covered by the Scope of the Draft Law***

18. As noted in ODIHR's 2009 Opinion<sup>19</sup>, the draft Law appears to include a wealth of matters at the same time, some of which could perhaps be covered by separate legislation. Currently, the draft Law covers immigration (including entry and exit provisions) and internal migration, as well as the repatriation of ethnic Kazakhs (*oralmans*) and the exit of Kazakhstani citizens from the country. While it is welcomed that the issue of refugees and their rights/duties shall now be regulated in a separate law, this should be stated clearly in the Preamble of the draft Law, with specific reference to the Law on Refugees.
19. Nevertheless, the current approach still remains unnecessarily broad. 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.<sup>20</sup> The other topics currently covered by the draft Law could be regulated in other legislation or sub-legal norms. For example, the repatriation of oralmans could be addressed more appropriately in a separate law, which would also take into account the special status of oralmans as opposed to other immigrants.
20. As for internal migration, it would appear that every person's freedom of movement within Kazakhstan (internal migration) is already laid down in the Constitution (see par 13 *supra*) and may thus not need to be repeated in a separate law. Exceptional cases where the State may restrict freedom of movement are already stipulated in separate legislation (Article 57 par 1), presumably this includes legislation on emergency situations, criminal law,

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<sup>18</sup> UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, was adopted by General Assembly resolution A/RES/45/158 on 18 December 1990. This Convention was not signed or ratified by the Republic of Kazakhstan.

<sup>19</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 19.

<sup>20</sup> States like Austria, Finland, Greece, Iceland, the Netherlands, Norway, Russia 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.

national security, etc. The matter of registration of internal migrants would also appear to be covered sufficiently by general legislation on the registration of places of residence, and likewise does not need to be mentioned specifically in this draft Law. The recommendation to avoid repetition is made in particular in view of the necessity to ensure that persons to whom the laws apply are able to ascertain their rights and obligations as well as potential liability in as easy a manner as possible and ideally, in one place.

21. As for the internal migrant resettlement quota, this appears to constitute a government project that offers special benefits for persons from structurally weak areas (Article 59 par 2 speaks of “citizens [...] and administrative-local units with particularly unfavorable environmental conditions”) wishing to move to “economically perspective populated areas”. It is an *ex gratia* government project that need not be mentioned in a law – it could instead be laid down in a special government action plan, which would also include eligibility requirements for persons wishing to be part of the quota, and the procedure for inclusion in the quota. According to Article 60, this procedure is currently defined by the Government of Kazakhstan. In order to make the draft Law more comprehensible, it is thus recommended to exclude internal migration from its scope completely. Excluding the quota from the draft Law would also ensure that this quota is not misunderstood as a limitation to individuals’ constitutional right to move and resettle freely within Kazakhstan and would provide the government with the flexibility to adjust the quota, without having to pass an amendments to primary legislation.
22. With regard to the exit of citizens from the country, it is noted that the compatibility of special provisions for leaving one’s own country with the Constitution of Kazakhstan on the one hand, and the ICCPR and OSCE Commitments on the other was already questioned in ODIHR’s 2009 Opinion.<sup>21</sup> These doubts still persist, and will be discussed in more detail in pars 106-110 *infra*. Suffice it to say at this point that, due to its inherent limitation of Kazakhstani citizens’ freedom of movement, it is advised to delete Articles 61-63 on the exit of citizens and exclude this matter from the scope of the draft Law.
23. Basic principles and objectives of the state migration policies are mentioned in Article 4 of the draft Law. In addition to the current objectives mentioned under Article 4 par 2, it is recommended to include the pursuance of maximum social, cultural and economic benefits of immigration, promotion of the integration of permanent residents and long-term immigrants (while recognizing that this involves mutual obligations for new immigrants and the society of Kazakhstan), as well as to further promote entry by students and temporary workers for the purposes of trade, commerce, and cultural, educational and scientific exchanges. Fostering respect for human rights and freedoms, which should include combating discrimination of migrants on national, racial or other grounds, and enhanced cooperation with domestic civil society and regional partners should also be included. An informed and sensitive (human-oriented) migration policy is essential, and decisions in the field of migration should be based on scientific/research data and results.

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<sup>21</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 31.

#### ***4.2.2 Other Legislation on Migration***

24. According to Article 2 of the draft Law, legislation in the field of migration shall be based on the Constitution and shall consist in the (draft) Law and “other regulatory legal laws”. This article does not, however, clarify which other laws it is referring to.<sup>22</sup>
25. Such vague terminology is not only found in the current draft Law. Rather, OSCE/ODIHR has raised the lack of legal certainty and foreseeability of draft legislation in the Republic of Kazakhstan in many of its more recent opinions.<sup>23</sup> The formulation “other laws” in Article 2 does not specify which laws of Kazakhstan regulate matters pertaining to migration, nor does it clarify which law will take precedence over other laws in which circumstances. This could lead to difficulties when applying the law. It is essential that this be clarified in the draft Law, and that Article 2 lists specifically which other laws of Kazakhstan regulate which migration-related matters. This will also help demonstrate whether in certain situations, other legislation will take precedence over the draft Law.
26. Furthermore, all instances of other laws having precedence over the draft Law should be specified and in matters pertaining to the scope of the draft Law should be the exception to the rule. A Law on Migration Processes will only fulfill its purpose properly if it is the primary piece of legislation in this field and as such takes precedence over related aspects found in other legislation. Exceptions to this rule of precedence must be named specifically in the draft Law (by name and provision of the respective law) and in the relevant other legislation. It is recommended to include a list of such cases in the draft Law, possibly under Article 2.

#### **4.3 Terminology Used in the Draft Law**

27. Article 1 of the draft Law defines main concepts and terms used in the draft Law. It is welcomed that certain vague terminology, such as emigrants and emigration, has been removed from the draft Law, and that an attempt has been made to clarify other terms. At the same time, it is noted that not all of the 29 terms contained in Article 1 appear to be clear, or always necessary. Also, Article 1 does not contain definitions to all terms used in the draft Law.

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<sup>22</sup> Similarly vague references to other legislation, including international agreements, may be found, e.g., in Articles 10 par 7, Article 11 pars 5,6, 8, and 14, Article 12 par 4, Article 16 par 2 (4), Article 5 par 1 (1) and (2) and par 2 (1), Article 6 par 1, Article 7 par 2, Article 19 par 3, Article 21 pars 1 and 2 (1), Article 24 par 3, Article 25 par 4, Article 28 pars 2 and 4, Article 30 pars 1 and 2, Article 31 par 1, Article 33 par 2 (5), Article 34 pars 1, 2 (1) and 3 (1), Article 48 par 3, Article 54 par 7, Article 55 par 10, Article 57 par 1, Article 62 pars 7 and 8, Article 63 par 1, Article 64, Article 65, par 1, Article 66, Article 67 pars 1 and 2, and Article 68.

<sup>23</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, pars 20-21, OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Crime Prevention (Opinion No. CRIM - KAZ/140/2009) of 13 October 2009, par 19, OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Access to Information (Opinion No. FOI – KAZ/164/2010) of 16 November 2010, par 14, and OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures (Opinion No. GEN – KAZ/170/2010) of 29 December 2010, pars 15-16.

28. Generally, it is not evident what type of order Article 1 follows – it appears to be neither thematic nor alphabetical and thus makes it difficult for users of the law to find the necessary definitions quickly. It would be advisable to better organize the list of definitions to ensure easier readability, either by topic or alphabetically.
29. While it is apparent that some attempts have been made to streamline certain definitions, several terms defined in Article 1 are not consistently applied throughout the draft Law. For example, the term “labour migration” is defined in Article 1 par 2, but is not used later in the draft Law – Chapter 4 of the draft Law speaks of labour immigration, not migration. Part 3 of the draft Law on internal migration, on the other hand, does not differentiate between labour migrants and other migrants. Since this term appears to be redundant, it is recommended to delete the definition of “labour migration” from the wording of Article 1.
30. Generally, the draft Law still appears to follow no clear concept of when to use the term “migration” and when to refer to “immigration”. It is recommended to discuss possible concepts in this regard and then apply one concept throughout the draft Law.
31. The definitions of “irregular migration” and “irregular migrant” (Article 1 pars 3 and 4) raise similar issues; both provisions refer to “aliens and stateless persons” (Article 1 par 4 defining “irregular migrant” actually only refers to aliens), which would imply that the act described herein should more precisely be termed as irregular or illegal immigration, not migration.
32. It is welcomed that the term “migration” has now been included in Article 1 under par 8. However, the definition appears too expansive as it seems to cover all types of movement between states and within a state, permanent or temporary, voluntary or forced. It could be helpful to replace it with a more concise definition of migration, e.g. the definition adopted by the International Organization for Migration (IOM), which merely describes migration as “a process of moving, either across an international border, or within a state”<sup>24</sup>. This definition already implies that it covers any type of movement of people, whatever its length, composition and causes.<sup>25</sup> The definition of migrant should also be made more precise, since the current definition (individuals coming to/leaving Kazakhstan regardless of cause or duration) could well also cover persons who merely visit Kazakhstan for a few days.
33. ODIHR’s 2009 Opinion states that while the term “migrator” is defined in Article 1 (par 13 in this draft Law), it does not appear throughout the text of the draft Law.<sup>26</sup> This does not seem to have changed much, though the definition of migrator (internal migrants resettling within Kazakhstan as part of the internal migrant resettlement quota) is reiterated in Article 56 par 1. Articles 59 and 60 of the draft Law, on the other hand, regulating the establishment of internal migrant resettlement quotas and assistance for people within these quotas, do not mention the term “migrator”. Further, the group of persons defined as “migrators” under Article 1 par 13 appears to be more or less identical to the

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<sup>24</sup> See International Migration Law: Glossary on Migration, published by IOM in 2004, p. 41.

<sup>25</sup> Ibid.

<sup>26</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 22.

group of persons covered by the definition of internal migrants under Article 1 par 26. It is thus recommended to delete the term “migrator” from Article 1.

34. It is noted that the definition of missionary activity under Article 1 par 14 remains the same as in the last version of the draft Law reviewed in ODIHR’s 2009 Opinion, which was provided with the help of a member of the OSCE/ODIHR Advisory Panel on Freedom of Religion or Belief. As stated in the 2009 Opinion<sup>27</sup>, the definition of missionary activity is ambiguous, as it specifies that missionary activities can only be undertaken by religions that are not part of the “regulations on religious communion acting on the territory of Kazakhstan”. As in the earlier version of the draft Law, it is not clear what objective and thus non-discriminatory ground could be used for distinguishing between different religions in this fashion.
35. Generally, it is reiterated at this point that 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;<sup>28</sup> that protect rights to import and disseminate religious publications and materials;<sup>29</sup> that protect freedom of speech and the right to disseminate information;<sup>30</sup> and that allow believers, religious faiths and their representatives to establish and maintain direct personal contacts and communications with each other.<sup>31</sup> It is thus once more recommended to eliminate the above ambiguities in the definition of missionary activity.<sup>32</sup>
36. It is further noted that the definition of internal migration under Article 1 par 25 speaks of the “movement of citizens” within a country, while the definition of internal migrants under Article 1 par 26 speaks of “individuals resettling in [...] Kazakhstan”. It is recommended to ensure that these two definitions are made consistent – whereby it would be preferable to adhere to the definition of internal migration (Article 1 par 25), which appears to be more coherent and specific than the current definition of internal migrant (Article 1 par 26). Since the internal migrant resettlement quota is merely a state instrument offering benefits to certain migrants, it should not be part of the definitions of internal migration or migrants. Such definition should also speak of “individuals”, not “citizens”, as everybody legally in the country has the right to move freely in Kazakhstan, not only citizens (Article 21 of the Constitution).
37. Finally, several terms used in the draft Law have not been defined under Article 1, namely aliens, stateless persons and foreign nationals, or temporary as opposed to permanent residence. Further, as stated in ODIHR’s 2009 Opinion<sup>33</sup>, the migration card mentioned in Article 6 par 5 has not been defined under Article 1. It is recommended to consider including such definitions.

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<sup>27</sup> Ibid., pars 64-65.

<sup>28</sup> Helsinki Final Act (1975), Co-operation in Other Fields, Information.

<sup>29</sup> See the Concluding Document of Vienna (1989), Principles 16.9, 16.10.

<sup>30</sup> See, e.g., the Concluding Document of Copenhagen (1990), Principles 9.1, 10.1 and 10.2.

<sup>31</sup> See the Concluding Document of Vienna (1989), Co-operation in Other Fields, par 32.

<sup>32</sup> 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.

<sup>33</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 22.

38. It is also noted that the definitions of foreign workers, business immigrants and seasonal workers are listed under Article 22, not Article 1. In particular, since Article 1 does contain definitions for the foreign workforce employment quota, the foreign workforce employment permit and the foreign worker's work permit, it would be consistent to also include the definition of foreign worker under Article 1.
39. When defining foreign workers, it may be worthwhile to take into consideration the definition of migrant worker under the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which states that a migrant worker is "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". While the Republic of Kazakhstan has not yet signed this Convention, it has repeatedly been urged to do so, *inter alia* in ODIHR's 2009 Opinion. Bringing certain terminology in the draft Law in line with the standards set by the UN Migrant Worker Convention would be a first step towards ratifying this important instrument.

#### **4.4 State System Governing Migration Processes under the Draft Law**

40. Chapter 2 of Part 1 (General Provisions) of the draft Law covers the state system governing "population migration processes" in Kazakhstan. Under this heading, Articles 8-16 of the draft Law describe the main competences of relevant bodies and organs, including the Government, the Migration Authority, the Ministry of Foreign Affairs, bodies of the interior, Public Health Authority, Education Authority, National Security Authority, justice institutions, and local executive institutions.
41. Among the tasks ascribed to the Government, Article 8 includes setting up procedures for immigrants' entry, stay and exit (par 6), as well as defining citizen registration procedures (par 8). It is not clear which procedural aspects of these matters will be regulated separately by the Government, since the entry, stay and exit of immigrants shall be regulated by the draft Law, and other legislation that deals with registration at places of residence. It is advised to clarify Article 8 pars 6 and 8 so that the Government's role in this matter becomes more transparent.
42. Article 9 regulates the competences of the Migration Authority, which is defined under Article 1 par as a "state body regulating migration processes and coordinating activities in the field of population migration". Article 6 also contains competences of the Migration Authority, which should, for the sake of consistency and clarity of the draft Law, be transferred to Article 9.
43. While Articles 1, 6 and 9 provide information on the tasks of the Migration Authority, the exact nature of this body is not defined in the draft Law. It is not clear whether this is an independent body or whether it belongs to or is accountable to a certain Ministry or other supervisory body. Perhaps the Migration Authority is identical to the recently established Migration Police Committee, which is currently not mentioned at all in the draft Law. Should this be the case, then the composition, appointment procedures, decision-making processes within the Committee, and reporting responsibilities should be specified in the draft Law. Generally, Article 9 should be made more transparent with regard to the nature and status of the Migration Authority.

44. The same recommendation for greater transparency also applies to Article 12 (Public Health Authority), Article 13 (Education Authority), and Article 14 (National Security Authority). The responsibilities of each body would be more transparent if the relevant provisions would mention each body's official denomination, e.g. the Ministry of Health, and the Ministry of Education. Article 10 specifically states that the competences mentioned therein are those of the Ministry of Foreign Affairs, and it is advised to apply the same clarity to the other provisions mentioned above.
45. One of the tasks of the Ministry of Foreign Affairs is keeping records of citizens of Kazakhstan permanently residing abroad. As raised in ODIHR's 2009 Opinion<sup>34</sup>, it is not clear what kind of records this refers to, nor is the purpose of such storage and processing of data listed. It is reiterated that this aspect of Article 10 should be clarified in the present draft Law and that the persons concerned are informed of the archiving of their data<sup>35</sup>.
46. Article 11 describes the competences of bodies of the interior – presumably, this includes the Ministry of Interior and subsidiary bodies, e.g. the police, prosecution, etc. Among other things, these bodies are competent to issue entry and exit permits for migrants (par 2) – presumably, this type of action refers to immigrants. Since Article 10 par 5 also tasks the Ministry of Foreign Affairs with the right to issue entry permits to aliens and stateless persons, it is recommended to clarify in which cases each Ministry issues which permit.
47. A similar clarification is necessary with regard to the competence of the bodies of the interior to issue exit permits to (im)migrants, which appears to overlap with the powers of the Migration Authority to issue exit permits to immigrants under Article 6 par 3. At the same time, it is not clear what type of exit permits for (im)migrants both provisions are referring to, especially whether such permits involve visas or cases where individuals exceeded their permission to stay. Generally, immigrants staying in Kazakhstan should be permitted to exit the country without a special permit.
48. The bodies of the interior are also competent to issue exit permits for citizens of Kazakhstan. As noted in ODIHR's 2009 Opinion<sup>36</sup>, it is doubtful whether exit permits for citizens comply with international freedom of movement standards laid down in instruments such as the ICCPR and reiterated in the Constitution of Kazakhstan. As discussed in greater depth in pars 106-110 *infra*, it is recommended to delete exit permits *per se* from the draft Law.
49. In general, it is noted that the Migration Authority, the bodies of the interior, and the National Security Authority are all tasked with setting up common databases

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<sup>34</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 36.

<sup>35</sup> 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".

<sup>36</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 31.

on, e.g. entry and exit of aliens and stateless persons, temporary and permanent residence of aliens and stateless persons, exit of citizens, or labour migrants and oralmans. While the relevant provisions (Articles 9, 11 and 14) also specify the need to cooperate with other relevant authorities, it is recommended to consider whether it may not be more worthwhile to establish one central database with access rights to all relevant institutions. This could avoid overlaps and ensure an automatic flow of information between different bodies. Such a database should, of course, follow relevant domestic and international data protection standards on storing personal information<sup>37</sup>, and the access of different state institutions should be limited to their areas of competence, as necessary for the implementation of their tasks.

50. Article 15 on the competences of justice institutions includes numerous tasks of such institutions, mainly involving registration of individuals. Since Article 68 states that disputes involving the draft Law shall also be resolved before courts, it would appear consistent and advisable to add the competence to decide such cases to the list of tasks under Article 15.
51. Article 16 specifies the competences of local executive authorities in oblasts and districts. Par 2 stipulates that local executive authorities in districts (towns of oblast importance) shall assist oralmans and migrants. While these authorities provide oralmans with assistance in getting employment, professional training, retraining and improving their qualifications (par 2 (3)), Article 16 does not provide them with access to schools, or medical or social organizations, even though such benefits are mentioned specifically in Article 42 (benefits for oralmans). At the same time, migrants should also receive professional and vocational training, not only access to education and medical/social organizations. These matters should be clarified and made consistent in Article 16.
52. Next to the local executive authorities, special centres set up by the Government under Article 8 are likewise tasked to provide integration and adaptation services to immigrants and oralmans (Article 1 par 11). These shall include information, and legal, social, medical and educational support (Article 1 par 24). In order to avoid overlaps, the draft Law should clarify how these centres and the local executive authorities shall coordinate tasks. If the immigration and oralman adaptation and integration centres are established by the Government, but run and funded jointly with the local executive authorities, then this should also be mentioned explicitly in the draft Law. In this context, Article 8 and other relevant provisions of the draft Law should also mention cooperation with non-governmental organizations, and manners of supporting such organizations if they provide integration services to immigrants and oralmans.

#### **4.5 Immigration to Kazakhstan**

53. Immigration, defined under Article 1 par 6 as “entry of aliens or stateless persons into the Republic of Kazakhstan for temporary or permanent residence” is regulated under Part 2 of the draft Law. At an earlier stage of the draft Law, under Part 1, Chapter 1, Article 3 outlines five different types/purposes for immigration: repatriation to the historic homeland, family reunification,

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<sup>37</sup> See the UN Guidelines for the regulation of computerized personal data files (footnote 35).

education, work and humanitarian and political motives. For the sake of consistency of the draft Law, it is advised to place this provision at the beginning of Part 2 on Immigration.

#### ***4.5.1 General Issues***

54. Article 5 of the draft Law deals with general rights and responsibilities of immigrants. It is welcomed that rights and freedoms shall be enjoyed on the basis of equality of treatment with citizens of Kazakhstan (par 1 (1) of Article 5). However, the limitation of this principle in certain cases envisaged by laws and international agreements ratified by Kazakhstan (also Article 5 par 1 (1)), appears unnecessarily vague and does not inform immigrants in which cases exactly they shall be treated differently from citizens of Kazakhstan. The same applies for obligations of immigrants, which according to Article 5 par 2 (1) shall be the same as for citizens, except in cases specified by law.
55. Further, Article 5 par 3 stipulates that immigrants shall have rights to education, medical, and social assistance as established by the legislation of the Republic of Kazakhstan, without speaking of equality between immigrants and Kazakh citizens with regard to these rights and without specifying which legislation it is referring to. It should be clear in this provision that education also includes the education of immigrants' children and that access to education should be granted on an equal basis with Kazakhstani citizens. At the same time, it is considered negative that housing rights mentioned in the previous version of this Article (reviewed in ODIHR's 2009 Opinion) have been deleted.
56. 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<sup>38</sup> confirm 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 questionable whether this is compatible with the general international principles of equal treatment between citizens and foreign nationals residing in a country (see par 15 *supra*). It is recommended to ensure that the draft Law provides, as far as possible, equal treatment to immigrants in the fields of not only education, medical and social assistance, but also housing. Exceptions to this rule should be mentioned specifically in the draft Law by name of the relevant law and, if possible, provision.
57. Additionally, as raised in ODIHR's 2009 Opinion<sup>39</sup>, it is recommended to add provisions on the equality of rights of immigrants and citizens 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.

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<sup>38</sup> This decree was passed on 19 June 1995 and amended in 1997 and has the power of law in Kazakhstan.

<sup>39</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 41.

58. Aside from guaranteeing certain rights and freedoms to immigrants, Article 5 of the draft Law offers paid integration and adaptation services to immigrants. Oralmen shall receive the same services for free. While it is understandable that state authorities offer special incentives for oralmen to return to Kazakhstan and integrate into society, integrating other immigrants is also paramount to ensuring stability in society. Fees for integration and adaptation services may well prevent immigrants from making use of these services, which could lead to a situation where significant parts of the population of Kazakhstan are not properly integrated into society. This cannot be desirable for any State, let alone a State with a significant number of immigrants such as Kazakhstan. It is thus proposed to reconsider this provision and provide state integration and adaptation services free of charge for all immigrants, not only oralmen, as also foreseen in certain OSCE Commitments.<sup>40</sup> Should certain services be provided by private businesses operating in cooperation with the State, then any fees paid for such services should be paid for by all immigrants, including oralmen.
59. Under Article 6 par 5, immigrants are required to register within 5 calendar days after crossing the state border to Kazakhstan, or if changing their place of residence within Kazakhstan. While it is positive that immigrants may personally register themselves, the time period within which they may do this appears to be quite short. Given the fact that Kazakhstan is a large country and that travel may at times be slow, it is recommended to extend this period, or to at least amend this provision so that it speaks of 5 working days, not calendar days. In this context, it is noted that internal migrants have 15 days in which they must register at their new place of residence, from the date of de-registration from their previous residence. Immigrants should have a similarly long period in which to register, especially since they may need more time to obtain detailed information on the registration procedure in Kazakhstan.
60. At the same time, contrary to the case of business immigrants, the draft Law does not specify what would happen if an immigrant attempts to register after the statutory time period. Potential sanctions should be stated clearly in the draft Law. Such sanctions should, however, be proportionate to the action and should not exceed an administrative fine. Any disproportionately harsh or excessive sanction could be interpreted as an obstacle to every person's freedom of movement under Article 21 of the Constitution.
61. Article 7 of the draft Law lists the types of foreigners or stateless persons not considered to be immigrants under the draft Law and is titled "non-immigrant individuals". It is recommended to amend the title of this provision to reflect its contents, as the current title may suggest that it generally refers to all persons (including internal migrants) who are not immigrants.

#### ***4.5.2 Different Types of Immigrants***

##### ***4.5.2.1 Educational Immigrants***

62. Chapter 3 of the draft Law deals with educational immigrants, including trainees and pupils of secondary schools. According to Article 19, educational

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<sup>40</sup> See Section 37 of the Human Dimension Chapter of the Concluding Document of Helsinki (1992) and Section 31 of the Human Dimension Chapter of the Concluding Document of Budapest (1994).

immigrants receive entry permits to Kazakhstan valid for no more than one year. These entry permits may be prolonged annually by an additional year for the term of the immigrant's studies. Temporary stay permits are, however, issued for the term of study identified on the basis of an application from the educational institution. It is noted that, as with other types of immigrants aside from oralmans, the provisions on educational immigrants do not foresee the right to apply for permanent residence (see par 92 *infra* for a more extensive discussion of this issue).

63. If educational immigrants have temporary stay permits for a certain period, then they should have the right to leave and return to Kazakhstan for as long as their stay permit lasts, in line with the freedom of movement principle outlined in Article 12 ICCPR (see par 11 *supra*). Entry permits *per se*, that need to be prolonged on an annual basis, would appear to constitute an unnecessary administrative burden for the competent authorities in such cases. In order to reflect this in the draft Law, it is recommended to amend Article 19 so that entry permits for educational immigrants with stay permits are valid for as long as the stay permits are valid.

#### *4.5.2.2 Labour Immigrants*

64. Based on Article 22, there are three categories of labour immigration, namely foreign workers, business immigrants and seasonal foreign workers. Structurally, it would appear that seasonal workers are a sub-category of foreign workers. At the same time, business immigrants, or investors, would appear to form a completely separate category. It is recommended to reflect these structural differences in Article 22.
65. With regard to foreign workers, it is welcomed that a number of aspects raised in ODIHR's 2009 Opinion with regard to labour immigration have now been improved in this version of the draft Law. One of these is the fact that foreign workers are no longer dependant on an invitation by an employer, but may now arrive in Kazakhstan without such invitation (Article 22 par 1), and may seek work independently (Article 23). This means that foreign workers are no longer fully dependant on their employers, but may, if they so desire, also leave a certain work place and apply for a work permit to seek other employment. This is a positive addition to the current draft Law.
66. However, it is noted that although foreign workers constitute the largest number of immigrants to Kazakhstan today, the three main provisions dealing with this category of immigrants (Articles 23-25) are not very detailed. The draft Law does not differentiate much within this group – there is no different treatment of highly qualified as opposed to less qualified foreign workers, and no differentiation with regard to certain fields within the labour market. It may well be difficult to attract high quality foreign labour if the individuals concerned may only stay for one or two years at a time, and may not bring their families with them (see par 76 *infra*). It is recommended to review this part of the draft Law and discuss ways to treat the matter of foreign workers in a more flexible manner.
67. The provisions on business immigrants and seasonal foreign workers have also been revised since the last draft and are now, for the most part, more coherent

and consistent. At the same time, Article 28 par 2 now states that delayed registration of a legal entity in Kazakhstan will, upon request of the competent local executive authority, lead to the reduction of business immigrants' stay in the country by the term necessary for their voluntary exit or deportation. Given that this is a rather invasive measure, it would be preferable to adopt a staggered approach, with voluntary exit or deportation as the last resort. Other less invasive means to ensure registration could include warnings and (proportionate) fines.

68. Article 31 is titled main rights and responsibilities of labour immigrants, but focuses mostly on their responsibilities (including the obligation to exit Kazakhstan once the stay permit has expired). The only right included under par 3 is the right to apply for obtaining or extending the term of a work permit. As stated earlier when discussing rights that should be enjoyed by immigrants (see par 57 *supra*), labour immigrants should also have 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).
69. Furthermore, as raised in ODIHR's 2009 Opinion, the right for foreign workers to establish and join trade unions should also be included in the draft Law. This general right is based in both Article 22 of the ICCPR and Article 8 of the ICESCR<sup>41</sup>, as well as Article 2 of the ILO Convention C87 on Freedom of Association and Protection of the Right to Organise<sup>42</sup> (1948) and certain OSCE Commitments.<sup>43</sup>
70. Foreign workers should be informed of these and other rights (and responsibilities) in a language that they understand. It is recommended to include this in the draft Law and add this obligation to inform to the competences of one of the bodies mentioned in Chapter 2 of the draft Law, preferably the Migration Authority.
71. In order to further guarantee the protection of foreign workers and their families, it is also once again 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, as well as the 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 continue its efforts to sign further bilateral agreements with neighboring countries on seasonal workers, to reduce the number of seasonal workers illegally in Kazakhstan.

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<sup>41</sup> According to Article 8 par 2 ICESCR, 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 22 par 2 ICCPR indicates the same limitation, while adding the protection of public safety, and the protection of health and morals as justified grounds for the limitation of this right.

<sup>42</sup> 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.

<sup>43</sup> See, e.g. the Concluding Document of Helsinki (1992).

*4.5.2.3 Immigration with Family Reunion Purposes*

72. It is considered positive that under Article 32 par 1, all family members that are supported by certain sponsors listed in this provision have the right to immigrate for purposes of family reunion.<sup>44</sup>
73. Under Article 32, persons sponsored by a citizen of Kazakhstan shall receive residence permits for three years, with the possibility of further annual extension. Since persons arriving in Kazakhstan for family reunion will most likely come to live with the sponsor, it would be preferable if their residence permits were longer, possibly even of a permanent nature, especially if they are married to or dependant on the sponsor. It is therefore recommended to foresee longer, possibly permanent residence permits for such people. The same should apply in cases where the sponsor has a permanent residence permit in Kazakhstan (currently, their family members may obtain residence permits for one year, with the right for annual extension).
74. However, while all family members sponsored by citizens of Kazakhstan may enter the country for family reunion, “other family members whose support is a responsibility of the sponsor” may not do so if the sponsor is an ethnic Kazakh, an immigrant with a temporary or permanent residence permit or a business immigrant (Article 32 par 4). Given the dependency of such persons on the sponsor, it is recommended to revise this provision so that also these “other family members” may apply for residence for family reunification purposes, for as long as the sponsor is residing in Kazakhstan.
75. Further, as already raised in ODIHR’s 2009 Opinion<sup>45</sup>, Article 32 should generally specify throughout that “guardianship over under-aged children” implies “legal guardianship”, to avoid misuse. 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).<sup>46</sup>
76. Immigration with family reunification purposes is not allowed for family members of educational immigrants, foreign workers, seasonal foreign workers and immigrants for humanitarian and political purposes (Article 32 par 5). It is not clear why these categories of immigrants shall not be allowed to bring their families to stay with them, for as long as they themselves are allowed to remain in Kazakhstan. Particularly immigrations for political purposes (refugees and asylum seekers) should have the right to reunite with their families<sup>47</sup> – any limitation to this right is not compatible with international standards promoting family reunion for refugee families<sup>48</sup>.

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<sup>44</sup> This reflects relevant OSCE commitments supporting family reunion, e.g. the Helsinki Final Act (1975), Co-operation in Humanitarian and Other Fields, b) Reunification of Families.

<sup>45</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, pars 76 and 77.

<sup>46</sup> See the Helsinki Final Act (1975), Cooperation in Humanitarian and Other Fields, 1 b).

<sup>47</sup> *Ibid.*, par 78.

<sup>48</sup> 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 within their territories in the Helsinki Final Act (1975) and the Concluding Document of Madrid (1983)

77. Article 33 par 3 states that in case of termination of circumstances necessary for issuing a temporary permit for family reunion, immigrants 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. As stated in ODIHR's 2009 Opinion<sup>49</sup>, it is recommended to include in this provision exceptions for cases of extreme hardship – in such cases, family members should be permitted to stay for a longer period or even permanently if they do not have the means to support themselves elsewhere and still have social contacts in Kazakhstan.
78. Article 34 on the rights and responsibilities of immigrants arriving for family reunification purposes is mainly focused on access to education for children (par 1) and labour activities for family members. It is proposed to add to this provision the right to general human rights and freedoms, in particular access to housing, healthcare, education, and social welfare, etc (see pars 56-57 *supra*).

#### *4.5.2.4 Immigration for Repatriation to the Historic Homeland*

79. Chapter 6 of the draft Law covers cases where ethnic Kazakhs (oralmans) previously residing elsewhere return to settle in Kazakhstan. Under Article 37 of the draft Law, oralman may apply for inclusion in the Oralman Immigration Quota. Inclusion in this quota provides oralman with additional social assistance (Article 1 par 16).
80. It is welcomed that the nature of the quota is clarified in this version of the draft Law. However, while the procedure for inclusion in the quota is outlined in Article 39, there is no information on the criteria that local executive bodies will apply when deciding on whether to accept applications for inclusion in the quota or not (Article 39 par 3). Possibly, these will be the same criteria as those listed in Article 39 par 4, which will be fulfilled if a person falls under the definition of ethnic Kazakh (oralman) under Article 1 par 15. It would be helpful to clarify par 3 accordingly. As mentioned in ODIHR's 2009 Opinion<sup>50</sup>, the working procedures for the Commission for Inclusion in the Oralman Immigration Quota should be as transparent as possible, and should include the right to appeal against decisions denying inclusion in the quota.
81. According to Article 39 par 11, oralman and their families shall be included in the Oralman Immigration Quota after having received permanent residence permits and having registered at their place of residence. Since Article 39 par 4 also speaks of a decision on inclusion in the quota (albeit a preliminary decision) at an earlier stage, it is recommended to specify in par 11 that this provision speaks of a final decision on inclusion in the quota.
82. Rights and responsibilities of oralman are listed in Article 47 of the draft Law. It is advisable to specify that oralman shall, as far as possible, have the same rights and freedoms as citizens of Kazakhstan. Par 2 requiring oralman to undergo medical examination, immunization or treatment should also be revised. Undergoing medical examination or treatment should be voluntary, not an obligation. At the same time, it is not clear why this obligation exists for oralman, seeing as other types of immigrants are not explicitly (and should also

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<sup>49</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, par 80.

<sup>50</sup> *Ibid.*, pars 81-82.

not be) obliged to submit themselves to such medical examinations or treatment under the draft Law.

83. According to Article 47, oralmsans may stay in migration and adaptation centres for three days, after which they are required to leave these facilities. As stated in ODIHR's 2009 Opinion<sup>51</sup>, this provision still does not provide for cases where appropriate alternate accommodation has not been found at the end of three days. It is once more recommended to amend this provision so that oralmsans may stay longer than three days until alternate accommodation has been found.

#### *4.5.2.5 Immigration out of Humanitarian or Political Motives*

84. According to Article 48, immigrants for humanitarian purposes are missionaries, volunteers providing free education, healthcare and social services, and immigrants arriving under international agreements for the purpose of offering charity, humanitarian aid and providing grants. Immigrants for political reasons are refugees and asylum seekers (Article 49), whose entry and stay are the object of separate legislation (Article 51).
85. According to Article 50 par 1, missionaries may only enter Kazakhstan for a period of up to six months, and their entry must be based on an application from a religious association registered in Kazakhstan and following an opinion letter from "an authorized body on relations with religious associations". It is noted that in the previous version of the draft Law reviewed in ODIHR's 2009 Opinion, missionaries were permitted to enter Kazakhstan for a period of one year, which could be extended for an additional year. The even more restrictive attitude adopted by the current draft Law could well prevent the free and wide dissemination of information of all kinds;<sup>52</sup> and could inhibit the implementation of OSCE Commitments protecting the right to import and disseminate religious publications and materials;<sup>53</sup> the freedom of speech and the right to disseminate information;<sup>54</sup> and allowing believers, religious faiths and their representatives to establish and maintain direct personal contacts and communications with each other.<sup>55</sup> It is recommended to reconsider this limited approach and grant missionaries a longer period of stay in Kazakhstan, with an option for extension.
86. Further, as stated in ODIHR's 2009 Opinion<sup>56</sup>, requiring missionaries to present an application from a religious association registered in Kazakhstan appears to unduly restrict the entry of new religious groups intending to conduct

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<sup>51</sup> Ibid., par 84.

<sup>52</sup> Helsinki Final Act, Co-operation in Other Fields, Information.

<sup>53</sup> See the Concluding Document of Vienna (1989), Principles 16.9, 16.10. See also Articles 6.d and 6.e of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief adopted by the UN General Assembly, as well as par 4.d of Resolution 2005/40 of the Commission on Human Rights and par 9.g of Resolution 6/37 of the Human Rights Council which urges States "To ensure, in particular, [...] the right of all persons to write, issue and disseminate relevant publications in these areas." Finally, the United Nations Human Rights Committee General Comment 22 states "In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, [...]the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."

<sup>54</sup> See, e.g., the Concluding Document of Copenhagen (1990), Principles 9.1, 10.1 and 10.2

<sup>55</sup> See the Concluding Document of Vienna (1989), Co-operation in Other Fields, par 32.

<sup>56</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, pars 68-69.

missionary activities. This is particularly problematic, both because it denies religious groups the recognition that they hold in their respective countries<sup>57</sup> and because some groups may object as a matter of conscience to registration with the State. It remains 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 may well run counter to the principle of religious neutrality that should be the foundation of each democratic state's immigration policy.<sup>58</sup>

87. Likewise, the purpose of requiring an opinion letter from an authorized body remains unclear. The nature of the "authorized body" is not specified in the draft Law, nor is it evident whether it is insulated from undue religious advice and influence. Moreover, the draft Law does not specify which standards or procedure this body will apply when preparing its opinion letter. Bearing in mind the above arguments, it is recommended to amend Article 50 to ensure that the entry of individuals for missionary activities will not be unduly restricted by other religious groups or executive bodies.
88. With regard to immigrants for political reasons (refugees and asylum seekers), it is recommended to delete all references to this type of immigrant from the wording of the draft Law, since their entry and stay conditions are now dealt with in the Law on Refugees (see also par 18 *supra*).

#### ***4.5.3 Rejection of Entry and Residence Permits, and Deportation***

89. Chapter 10 of Part 2 of the draft Law regulates the grounds for rejecting requests to enter Kazakhstan or to obtain residence permits (Articles 54 and 55). Provisions on deportation are to be found under Chapter 15 (Responsibility for violation of the Legislation on Migration of the Republic of Kazakhstan), Article 67. Numerous related issues raised in ODIHR's 2009 Opinion<sup>59</sup> remain ambiguous in the current draft Law.
90. Article 54 par 6 outlines the rejection of an entry request if the applicant violated domestic laws on legal status of aliens, tax, monetary and other matters during a previous stay in Kazakhstan. It is suggested to adopt a more differentiated approach here, by adding a clause by which the competent authorities will permit entry, on an exceptional basis, if the infringement was minor<sup>60</sup> (e.g. if it

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<sup>57</sup> See the Concluding Document of Vienna, Principle 16.3, in which OSCE participating States committed to granting communities of believers recognition of the status provided for them in their respective countries.

<sup>58</sup> See also Article 12 par 1, 2 and 4 of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which protects migrant workers' rights to religious freedom, which also include the right to manifest a religion or belief "in worship, observance, practice and teaching."

<sup>59</sup> See the OSCE/ODIHR Opinion on the draft Law of the Republic of Kazakhstan on Migration of Population of 24 September 2009, pars 49-61.

<sup>60</sup> In Sections 18 and 20 of the Icelandic Act on Foreigners No. 96 (15 May 2002, last amended 2008), 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

merely entailed a monetary or other administrative fine) and/or if it happened more than 10 years ago<sup>61</sup>.

91. Article 54 par 8 notes that the entry of immigrants may be rejected if they have an active form of tuberculosis, sexually transmitted diseases, including HIV/AIDS. Based on international good practice, entry should not be rejected based on a person's HIV/AIDS infection alone.<sup>62</sup> This would appear to apply to other sexually transmitted diseases as well. It is recommended to review this issue once more and delete these reasons from the list in Article 54 par 8, and also from the reasons denying residence permits under Article 55 par 15.
92. Prior to discussing Article 55 in detail, it is noted that while this provision lists in great detail when requests for permanent residence permits shall be rejected or existing permits annulled, the draft Law does not include a provision outlining how to apply for permanent residence. There is no information on who may be eligible to do so, based on which conditions and following which procedure, and in which situations such a request will be granted. Since granting permanent residence would appear to be the rule, and the rejection of such requests exceptions to this rule, it is recommended to include such a provision on permanent residence in the draft Law.
93. Article 55 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 advised to include in this provision exceptions for persons confined illegally.
94. Under Article 55 par 4, residence permits may be rejected/annulled for failure to pay a certain sum of money. Overall, the meaning and purpose of this provision remain unclear and should be clarified.
95. Article 55 par 13 states that in case individuals reside outside the Republic of Kazakhstan for more than six months, their requests for residence permits may be refused or previously issued residence permits may be annulled. This paragraph presumably applies only to persons applying for residence permits, since there appears to be no objective justification for annulling a person's existing residence permit merely because that person was out of Kazakhstan for six months. This matter should be clarified in Article 55 par 13.

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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).

<sup>61</sup> 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 Switzerland, entry bans generally last for 5 years, but may also last longer if the respective individual constitutes a grave danger for public security and order (Article 67 of the Federal Law on Foreigners, adopted on 16 December 2005, last amended in 2011). 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).

<sup>62</sup> 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".

96. Generally, it is reiterated in this Opinion that in the interests of transparency and accountability of government, any refusal of entry (Article 54) or of a residence permit (Article 55) should be provided to the applicant in writing and in a language understood by him/her. Also, the individual who was refused entry should have the right to appeal against the decision refusing him/her entry.<sup>63</sup> The applicant should be informed on the competent appeals body/court and on the laws and codes regulating appeals procedures. This latter information should also be provided to persons appealing against rejections of their applications for residence permit or stateless person's identity card (Article 55).
97. According to Article 67, irregular immigrants are subject to deportation to their country of origin or residence. While Article 67 par 1 states that this will be effected "in compliance with the law", it does not specify which law it is referring to. In order to ensure legality and foreseeability of the draft Law, it is paramount that Article 67 specifies, by name, which legislation will apply in cases of deportations.
98. On the whole, it should be noted that arrest and deportation are grave and invasive measures that should only be taken in extreme circumstances as a last resort. It is welcomed that under Article 65 par 3, the draft Law contains ways of legalizing the stay of hitherto illegal immigrants. It is recommended to consider expanding this instrument so that it can be used in a more flexible manner on a case by case basis, and not only every five years.
99. Thus, while it is positive that decisions on deportation shall be taken by competent courts, it is thus essential that courts also examine whether the arrest of irregular immigrants will in all cases be necessary or whether these persons should only be arrested if there are indications that they are dangerous or likely to abscond.<sup>64</sup> Unless special circumstances apply, Article 67 should specify that only persons over 18 years of age should be detained<sup>65</sup>.
100. Persons arrested under Article 67 should also have the right to be informed about the reasons for their arrest in a language which they understand<sup>66</sup> and be subjected to detention conditions that are compatible with standards of human dignity<sup>67</sup>. They should be able to appeal against their arrest and the conditions of detention<sup>68</sup>, as well as against the decision on their deportation, and should have

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<sup>63</sup> So far, the draft Law only provides a right of appeal to persons whose request for residence permit was rejected (Article 55, last sentence).

<sup>64</sup> 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.

<sup>65</sup> In Chapter 10, Section 2 of the Swedish Aliens Act (see footnote 60), 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).

<sup>66</sup> As required by par. 23.1. of the CSCE Moscow Document (1991) and Article 9, par. 2 of the ICCPR

<sup>67</sup> This is a right granted to everyone, without distinction, by Article 10, par. 1 of the ICCPR

<sup>68</sup> 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

access to legal counsel. The draft Law, or other legislation (referred to explicitly in the draft Law) should specify whether an appeal against a deportation decision will result in a stay of execution of this decision. In such cases, a stay of execution would be welcomed, as it would avoid situations where decisions on deportation are revoked by higher authorities or courts even though the person concerned has already been forced to leave the country.

101. While Article 67 states that the necessary period of detention before deportation shall be defined by the Government of Kazakhstan, it is reiterated that this term should be determined by a court. Article 67 should also include a limitation to the amount of time an individual may be detained pending deportation<sup>69</sup>. Moreover, it is recommended to include in Article 67 a clear ban on the collective expulsion of aliens<sup>70</sup>.
102. Generally, aliens should not be deported if there is a real risk for their lives or bodily integrity in the country of destination. The UN Human Rights Committee considers this principle (principle of non-refoulement) as being inherent in articles prohibiting torture and inhuman and degrading treatment (Article 7 of the ICCPR)<sup>71</sup>. As Kazakhstan is a signatory state of the ICCPR, it is recommended to include a clause in the draft Law prohibiting deportation if there are clear indications that the person concerned would be at risk of death, torture or ill-treatment in the country of destination.
103. Further, the draft Law should also include 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), where it would mean tearing apart families and where individuals can prove that they are extremely ill or over 70 years of age.
104. The competent authorities should also take into consideration the special circumstances of victims of human trafficking. Such persons should not be deported and should receive certain protection and assistance, including residence permits.<sup>72</sup>

#### **4.6 Exit of Citizens from Kazakhstan**

105. The exit of citizens from Kazakhstan is regulated in Part 4 of the draft Law. Article 61 differentiates between citizens leaving the country for permanent residence, and citizens leaving temporarily. The draft Law does not specify the terms “temporary” or “permanent”, nor does it envisage situations where persons originally leaving Kazakhstan temporarily decide to stay in their new place of residence on a permanent basis.

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contact a representative of his/her home country (Article 25 of the Act On Foreigners, see footnote no. 60).

<sup>69</sup> E.g. Article 25 of the Belgian Law on the Entry, Stay, Residence and Exit of Foreigners (adopted on 15 December 1980, consolidated version of 2011) permits detention pending deportation for a maximum amount of 4 months (after 5 months of detention, the person concerned must be released from detention). 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 60).

<sup>70</sup> See: OSCE Lisbon Summit Declaration 1996 par.10 on the prohibition of mass expulsion

<sup>71</sup> International Commission of Jurists, *Terrorism and Human Rights*, (Occasional Papers No. 2), April 2002, p. 246.

<sup>72</sup> Kazakhstan acceded to this Protocol on 30 July 2008.

106. Generally, citizens leaving Kazakhstan for temporary residence do not need permission to do so. Article 62 par 3, on the other hand, requires citizens leaving for permanent residence to apply for an exit permit prior to leaving the country. As stated in ODIHR's 2009 Opinion, this would not appear to be in line with Article 21, par 2 of the Constitution of Kazakhstan, which provides that everybody has the right to leave and return to the country, without mentioning that this shall be subject to any limitations. This approach would also not be in line with Article 12 par 2 of the ICCPR and various OSCE Commitments<sup>73</sup>.
107. Article 62 par 8 states that special (unspecified in the draft Law) legislation shall define the rights of individuals leaving Kazakhstan for permanent residence abroad with regard to property remaining in Kazakhstan. The purpose of this provision is not clear, as the mere fact of living outside of Kazakhstan should not impact any person's previously held property rights. It is recommended to clarify the aim and contents of this provision.
108. For the moment, exit permits for permanent residence abroad may be rejected for a number of reasons listed in Article 63 of the draft Law. One reason to reject a request for exit permit would be if the person concerned possesses information that is a state secret, or other legally protected secret (par 1). However, the mere mention of a state secret should not suffice to limit the freedom of movement in such a way, as stated by the UN Human Rights Committee in its General Comment No. 27 on Freedom of Movement (Article 12)<sup>74</sup>. According to this General Comment, restrictions of the freedom of movement must be based on clear legal grounds and must meet the test of necessity and the requirements of proportionality.
109. Under Article 63 par 4, an exit permit may be rejected if a person "escapes to fulfill obligations imposed by court, until fulfillment of the obligations or achievement of consent by parties". Under Article 63 par 6, this is possible in cases where applicants "consciously forged documents in order to be permitted to depart from Kazakhstan", and under Article 63 par 7, if a person is a defendant in civil court, until a court judgment is enacted. As all three cases involve either court proceedings or criminal acts, it is recommended to have limitations on these individuals' freedom of movement imposed by court decision, and not by a (more rigid) legal provision. The court could then decide itself whether it is really necessary to limit a person's freedom in each individual case or not.
110. Overall, it would appear that in the above provisions, limiting individuals' rights to leave their own country may amount to quite invasive and disproportionate measures. It is recommended to delete all reference to exit permits from the draft Law and to transfer the resolution of this issue to the level of courts..

#### **4.7 Liability and Settlement of Disputes**

111. Article 66 of the draft Law specifies that violations of the migration legislation of the Republic of Kazakhstan shall entail responsibility as established by the

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<sup>73</sup> A number of OSCE commitments 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.

<sup>74</sup> UN Human Rights Committee, General Comment No. 27: Freedom of movement (Art.12), 02/11/99.

laws of Kazakhstan. This provision is extremely vague, as it does not clarify which type of behaviour would be in violation of migration legislation, nor does it clarify whether migration legislation shall mean only the draft Law, or other legislation on migration matters mentioned in Article 2. It is thus recommended that Article 66 be expanded to outline, in detail, which type of conduct will be considered to be in violation of the draft Law, or other legislation specified by name. The list of conduct possibly in violation of the law should also indicate matching sanctions, and it should be clear from the wording of the provision whether this conduct will lead to administrative, civil or criminal liability. References to the proper procedure and competent bodies to deal with such cases should be added as well.

112. Moreover, Article 68 on the settlement of disputes is equally vague, as it merely speaks of appeals to higher-level state bodies, and/or courts, in accordance with the law of Kazakhstan. This provision should also be expanded to clarify in which cases higher-level state bodies are competent to deal with such disputes, and in which cases courts shall be competent. It is essential that overlaps of cases pending before administrative offices and cases pending before courts are avoided. Throughout, the draft Law should specify all cases where administrative action may be appealed. Finally, the exact procedure should be made clear, namely whether there is a first and second instance, and what the requirements are for admitting appeals.

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