

(Translated from Russian)

Draft

Reply from the Kyrgyz Republic to the joint communication of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, and the United Nations Special Rapporteur on the situation of human rights defenders, Michel Forst, concerning the Kazakh blogger Muratbek Tungishbaev

The Government of the Kyrgyz Republic, having considered the joint communication of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, and the United Nations Special Rapporteur on the situation of human rights defenders, Michel Forst, concerning the Kazakh blogger Muratbek Tungishbaev, submits the following information.

On 8 May 2018, the Office of the Procurator General of the Kyrgyz Republic forwarded an international legal assistance request to the Central Investigation Department of the State Committee on National Security of the Kyrgyz Republic. The request concerned a criminal case under articles 266 (1) and 405 (1) of the Criminal Code of Kazakhstan, registered as No. 187500031000620 by the Investigation Division of the Department of Internal Affairs in Almaty, Kazakhstan.

From the request received it emerged that the Kazakh citizens [REDACTED] and M. Tungishbaev had used the social networks Facebook and Telegram to provide information services to an organized criminal group led by Mukhtar Ablyazov.

Furthermore, these persons are active members of the DVK Activist group and help to select active supporters, welcome the radicalization of social network users and systematically instigate the discussion of thorny and sensitive issues in support of the extremist party Democratic Choice of Kazakhstan (DVK).

In the light of the foregoing, on 13 March 2018, the Esilsky District Court in Astana, Kazakhstan ruled that the DVK party was an extremist organization.

On 3 May 2018, the criminal acts of the suspect Mr. Tungishbaev in the aforementioned criminal case were categorized as offences under article 266 (1) of the Criminal Code of Kazakhstan.

On 4 May 2018, the Almalinsky District Court in Almaty approved the pretrial detention of Mr. Tungishbaev as a preventive measure.

On 10 May 2018, in order to execute the request for international legal assistance, a search was carried out at the current residence of the Kazakh citizen Mr. Tungishbaev in Bishkek, which resulted in the seizure of a computer and telecommunications equipment, money, and other objects and personal items.

In the course of the search, an arrest was made of Murat Bazarlyevich Tungishbaev, born on [REDACTED], a citizen of Kazakhstan [REDACTED]

On 10 May 2018, Mr. Tungishbaev was detained (taken into custody pending an extradition request) in accordance with article 94 of the Kyrgyz Code of Criminal Procedure and article 70 of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 7 October 2002.



In accordance with the provisions of article 72 of the Convention, a detention order issued by the competent department of justice of the requesting Contracting Party (Kazakhstan), or an order of the competent department of justice of the requested party (the Kyrgyz Republic), if that party's legislation so provides, is required to place in a detention facility any person taken into custody (detainee) in relation to whom an extradition request is being considered.

The ex parte preventive detention order issued on 4 May 2018 by the investigating judge of the Almalinsky District Court in Almaty, Ms. [REDACTED], constitutes such an order.

The detention of a person taken into custody (detainee) is carried out in accordance with the law of the requested Contracting Party, in this case the Kyrgyz Republic.

On 11 May 2018, the Pervomaysky District Court in Bishkek ruled that the detention of Mr. Tungishbaev was lawful and justified and ordered that he be held in preventive custody for 2 months (until 10 July 2018) in State Penal Correction Service facility No. 21 of the Government of Kyrgyzstan. The criminal and administrative chamber of Bishkek City Court upheld that decision on 28 May 2018. The criminal and administrative chamber of the Supreme Court of Kyrgyzstan upheld the decisions of the first and second instance courts on 13 June 2018.

The relatives of Mr. Tungishbaev were informed of his arrest and notification was also sent to the Consular Services Department of the Ministry of Foreign Affairs of Kyrgyzstan, with a view to informing the diplomatic mission of Kazakhstan in the Kyrgyz Republic.

Notification was also sent to the originator of the letter of request for international legal assistance in the Department of Internal Affairs in Almaty, with a view to informing the competent department of justice of Kazakhstan.

On 12 May 2018, the Office of the Procurator General of the Kyrgyz Republic received a request from the Office of the Procurator General of Kazakhstan to extradite Mr. Tungishbaev in order that he might be prosecuted, along with an extradition file.

On 21 May 2018, pursuant to articles 433 and 434 of the Kyrgyz Code of Criminal Procedure and article 66 of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 7 October 2002, the Office of the Procurator General of the Kyrgyz Republic approved the extradition of Mr. Tungishbaev for the purpose of his prosecution under article 405 (2) of the Criminal Code of Kazakhstan, given that article 405 (2) of the Criminal Code of Kazakhstan is equivalent to article 299¹ (3) of the Criminal Code of the Kyrgyz Republic. The crime with which Mr. Tungishbaev is charged by the law enforcement authorities of Kazakhstan is an extremist offence directed against the interests of the Republic of Kazakhstan regardless of the *locus delicti*.

Furthermore, in accordance with article 8 (1) of the Criminal Code of Kazakhstan, "Citizens of the Republic of Kazakhstan who commit criminal offences outside its borders are liable for prosecution under this Code, if the act they commit is a crime in the State in the territory of which the act was committed and if these persons have not been convicted in the other State. If such persons are convicted, the sentence may not exceed the maximum penalty under the law of the State in the territory of which the criminal offence was committed. On the same grounds, foreign nationals and stateless persons present in the territory of Kazakhstan may be prosecuted when cannot be extradited to a foreign State, for prosecution or to serve a sentence in accordance with an international treaty of Kazakhstan."

It should be noted that, in accordance with article 66 (1) of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 7 October 1992, "the Contracting Parties undertake to extradite to each other, upon request and subject to the provisions of the present Convention, persons present in their territory, for the purpose of prosecution or the execution of a sentence".

In accordance with article 66 (4) of the Convention, "In determining whether the act for which extradition is requested is a crime under the national law of the requested or requesting Contracting Party, differences in the description of the constituent elements of the offence or the terminology used shall be of no relevance."

According to information from the procurator's office of Almaty, Kazakhstan, after the transfer of Mr. Tungishbaev by the competent authority of Kazakhstan, on 27 June 2018 the

Investigative Division of the Department of Internal Affairs in Almaty issued a new decision, in which the actions of the suspect were categorized as offences under article 405 (2) of the Criminal Code of Kazakhstan.

Prosecution of Mr. Tungishbaev under article 266 (1) of the Criminal Code of Kazakhstan was rejected, because the crime alleged by Kazakhstan on these grounds does not constitute an offence under Kyrgyz law.

The decision to extradite Mr. Tungishbaev was made in view of the assurances given by the Office of the Procurator General of Kazakhstan that Mr. Tungishbaev's rights would be respected through the provision of all the guarantees necessary for his defence, including the assistance of counsel. Assurances were also given that Mr. Tungishbaev would not be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Furthermore, in the extradition request concerning Mr. Tungishbaev, the Office of the Procurator General of Kazakhstan provided assurances that the requirements of article 80 of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 7 October 2002 regarding the limitations on prosecution of the extradited person would be met, that the prosecution of Mr. Tungishbaev was not political in nature and that he would be provided with all guarantees necessary for his defence and enjoyment of the rights enshrined in the Constitution of Kazakhstan, the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 September (sic) 1950 and the International Covenant on Civil and Political Rights of 16 December 1966.

Furthermore, regarding the possibility that torture might be used against Mr. Tungishbaev after his transfer to the competent authorities of Kazakhstan, the Office of the Procurator General of the Kyrgyz Republic has submitted the following information.

At the request of the Office of the Procurator General of the Kyrgyz Republic for evidence that torture and other cruel, inhuman and degrading treatment or punishment would not be used if Mr. Tungishbaev were to be extradited, the Office of the Procurator General of the Republic of Kazakhstan replied in a letter that paragraphs 7 and 8 of general comment No. 1 (1996) of the United Nations Committee against Torture (General Assembly Official Records, fifty-third session, supplement No. 44 (A/53/44 and Corr. 1), Annex IX, para. 6) provide that it is the author who must establish that he or she is in danger of being tortured and that such a threat is personal and present. Moreover, the person cannot merely allege that there is a danger of torture but must provide "pertinent information", namely:

- Has the author been tortured or maltreated? If so, was this in the recent past? Is there medical or other independent evidence to support a claim by the author that he or she has been tortured or maltreated in the past?
- Is there any evidence as to the credibility of the author?

The Committee has stated in its general comment No. 1 on the implementation of article 3 that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable", meaning that the risk of being tortured must be foreseeable, present and personal.

In addition, the Office of the Procurator General of Kazakhstan gave assurances that the extradited person would not be subjected to torture or cruel, inhuman or degrading treatment or punishment.

After Mr. Tungishbaev had been served with the decision of the Office of the Procurator General of the Kyrgyz Republic of 21 May 2018 to extradite a citizen of a foreign State for the purpose of prosecution, Mr. Tungishbaev's lawyer filed a complaint with the Oktyabrsky District Court in Bishkek, claiming that the decision of the Office of the Procurator General of the Kyrgyz Republic was unlawful and unfounded.

Mr. Tungishbaev himself attended the court hearing of his lawyer's complaint. On 25 June 2018, the Oktyabrsky District Court in Bishkek dismissed the complaint of the lawyer Mr. N Toktakunov on behalf of Mr. Tungishbaev, in which it was claimed that the decision of the Office of the Procurator General of the Kyrgyz Republic of 21 May 2018 to extradite a citizen of a foreign State for the purpose of prosecution was unlawful and unfounded.

It should be noted that, during the court proceedings, Mr. Tungishbaev publicly stated that while in the Kyrgyz Republic he had previously contacted the local office of the United Nations High Commissioner for Refugees (UNHCR) to apply for refugee status and that his application had been rejected.

It should further be noted that Mr. Tungishbaev applied for refugee status with the State Migration Service of the Kyrgyz Republic (hereinafter referred to as the competent authority) on 15 May 2018. In his application, Mr. Tungishbaev stated “

[REDACTED]

As can be seen from his statement, there is no indication of why, having arrived in Kyrgyzstan in 2012 “to seek political asylum”, Mr. Tungishbaev did not apply to the competent authority until 15 May 2018.

It was only on 23 May 2018 that his wife [REDACTED] informed the competent authority in writing that the applicant was being held in custody and could not be present for the registration of his refugee status application. On 24 May 2018, the competent authority accordingly sent a letter to the State Committee on National Security of the Kyrgyz Republic to request access to the applicant. It should be noted that enclosed with the statement from Ms. [REDACTED] was a copy of a certificate attesting that the bearer was a person of concern to the United Nations High Commissioner for Refugees, which had been issued by the United Nations High Commissioner for Refugees office in Bishkek on 28 February 2012 in the name of Mr. Tungishbaev, registration number [REDACTED], valid until 28 March 2012.

The point to be borne in mind here is that the decision of the Procurator General of the Kyrgyz Republic to extradite a citizen of a foreign State for the purpose of prosecution was made on 21 May 2018. Moreover, according to information from the Procurator General of the Kyrgyz Republic, when that decision was taken, there was no official record that Mr. Tungishbaev or his representatives had applied to the State Migration Service of Kyrgyzstan for refugee status.

In this regard, we note that Mr. Tungishbaev did not have political asylum seeker or refugee status and therefore the obligations arising from the United Nations Convention relating to the Status of Refugees cannot apply to his extradition for prosecution in Kazakhstan.

Thus, the legality and soundness of the decision of the Procurator General of the Kyrgyz Republic to extradite Mr. Tungishbaev was considered in court proceedings, in which the court found the extradition decision to be lawful.

In accordance with the requirements of article 132 of the Code of Criminal Procedure of the Kyrgyz Republic, the order of 25 June 2018 of the Oktyabrsky District Court in Bishkek was immediately enforceable by the investigation authorities and the procurator’s office.

On 26 June 2018, in execution of the decision of the Procurator General of the Kyrgyz Republic of 21 May 2018, Mr. Tungishbaev was handed over to officers of the Department of Internal Affairs in Almaty, Kazakhstan.

Regarding the provision of timely and appropriate medical care to Mr. Tungishbaev for his eyes and the compliance of the conditions of his detention with international human rights standards, we note the following.

Mr. Tungishbaev arrived at State Penal Correction Service facility No. 21 of the Government of Kyrgyzstan (hereinafter referred to as Bishkek SIZO-1) on 25 May 2018.

At the start of June 2018, the remand prisoner Mr. Tungishbaev underwent surgery in the Azmanbek Ismankulov clinic to treat central retinal vein occlusion in his left eye. After the operation, intravitreal injections were recommended. He was registered by Bishkek SIZO-1 as requiring medical follow-up for stage 1 hypertension with a moderate risk of complications.

The organization of and access to health care for arrested persons, pretrial detainees and convicted prisoners are regulated by article 47 of the Constitution of the Kyrgyz Republic, the Health Care Act, and Government Decree No. 696 of 20 October 2015 on approval of the procedure for provision of health care in correctional facilities and pretrial detention centres of the prison system.

On 26 June 2018, Mr. Tungishbaev was transferred from Bishkek SIZO-1 and handed over to agents of the State Committee on National Security of the Kyrgyz Republic for execution of the decision of the Procurator General of the Kyrgyz Republic to hand him over to the competent authorities of Kazakhstan.
