

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

REFERENCE: UA G/SO 218/2 G/SO 214 (67-17) Health (2002-7) G/SO 214 (107-9) G/SO 214 (3-3-16) G/SO 214 (53-24) G/SO 214 (56-23)
KAZ 4/2013

22 August 2013

Excellency,

We have the honour to address you in our capacity as Chair-Rapporteur of the Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on freedom of religion or belief; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 16/4, 15/22, 16/5, 17/2, 22/20, and 16/23.

In this connection, we would like to bring to your Excellency's Government's attention information we have received concerning the alleged detention and forced psychiatric confinement of two human rights defenders. Ms. **Zinaida Moukhortova** is a human rights lawyer who has provided free legal aid, and works to fight against corruption and political interference in the judiciary. Mr. **Aleksandr Kharlamov** is a member of the human rights organization "Secret Service", he has published investigative journalism and works against corruption. He has also published atheist works.

According to the information received:

The case of Ms. Zinaida Moukhortova

In September of 2009, human rights lawyer Ms. Zinaida Moukhortova, along with three other lawyers, sent a complaint to your Excellency's Government alleging that there had been interference in the administration of justice by a member of parliament. According to sources, a criminal investigation was launched against the human rights lawyer in response to this complaint for "deliberate filing of a false complaint". On 12 February 2010, it is alleged that she was arrested in the

Balkash city court courtroom and detained in pre-trial detention facilities. In July 2010, she underwent a psychiatric examination in the Almaty psychiatric clinic and was diagnosed with a “delusional disorder”. Subsequent to this diagnosis, on 5 August 2010, the Balkash city court declared her guilty of the above charges but not legally responsible due to her alleged mental illness. Despite this, she continued to be detained in detention facilities rather than a hospital. On 12 January 2011 she was sent to the regional psychiatric hospital in Aktas, where she was forcibly administered unknown medication. During her detention it is reported that doctors carried out three examinations but, despite unofficially confirming her sanity, would not change her diagnosis due to external pressure. She was allegedly not released until 22 September 2011, after giving her word that she would not appeal her psychiatric report. It is reported that on 9 January 2012, the Supreme Court ordered a new examination of her case, and her diagnosis was confirmed in the Almaty psychiatric clinic. On 26 July 2012, the Balkash city court closed the case due to absence of corpus delicti. In September 2012, local human rights defenders invited an independent medical expert to examine Zinaida Moukhortova and her sanity was confirmed. Her case is now due to be reviewed in August 2013.

In recent months, it is reported that a nurse has been coming to Zinaida Moukhortova’s home every month to request her appearance for a check-up at the psychiatric clinic. This is in addition to official notifications requesting the same. The human rights lawyer reportedly had not responded to these requests out of fear that she would be forced to undergo more treatment. However, it is alleged that on 9 August 2013, at approximately 10 am, four police officers, a doctor, two nurses and two medical staff broke down the door of her home and forced her into an ambulance which transferred her to Balkhash psychiatric clinic. On the same day, Mr Amangeldy Shormanbaev, Zinaida Moukhortova’s lawyer, called the deputy head of the clinic and asked why she had been confined in this manner and was allegedly informed that it was because she had refused hospitalisation. When Mr. Shormanbaev pointed out that this is not a legal ground for forced psychiatric treatment, the deputy head allegedly hung up the phone.

According to the latest information received, Ms. Zinaida Moukhortova remains hospitalized in Balkhash psychiatric clinic against her will. Mr. Shormanbayev has so far not been able to see his client, and it is reported that the prosecutor of the town of Balkhash appealed to the court to rule to forcibly hospitalize Ms. Moukhortova. According to the sources, the last hearing took place on 19 August and it is reported that the Prosecutor’s motion to keep Ms. Moukhortova hospitalized was sustained by the judge.

The case of Mr. Aleksandr Kharlamov

On 25 January 2013, a criminal case was reportedly initiated against Mr. Aleksandr Kharlamov on charges of inciting religious hatred. On 6 February 2013, it is alleged that police searched his apartment, as well as the office of the newspaper “Ridderskiye novosti”, and seized a personal computer as well as several articles authored by Mr. Kharlamov. These items allegedly form the basis of the evidence against the human rights defender. On 14 February 2013, a

psychological and philological expert analysis of his writing was commissioned. On 11 March 2013, the Forensic Science Institute of East Kazakhstan conducted an examination of the publications and concluded that they were aimed at incitement of religious hatred as they contained negative statements about all religious systems, incited negative attitude towards religion and that they could have changed the thinking or behaviour of some citizens.

On 14 March 2013, it is reported that Mr. Aleksandr Kharlamov was arrested in the town of Ridder and charged with “incitement of social, national, ethnic, racial or religious hatred”. On 17 March 2013, a court authorised pre-trial detention for two months and he was reportedly held in a detention centre in the town of Ridder, then transferred to a centre in the city of Ust-Kamenogorsk and finally moved to a pre-trial detention center in Almaty

On 28 March 2013, a challenge to the legality of his detention was rejected by East Kazakhstan Regional Court. From 29 April 2013 to 27 May 2013, Mr. Kharlamov allegedly underwent a psychiatric examination at the Republican Scientific/Practical Centre of Psychiatry, Psychotherapy and Narcology in Almaty and was found sane. He was then moved to the pre-trial detention centre (SIZO) in Ust-Kamenogorsk. On 19 July 2013, the first trial in the case against Aleksandr Kharlamov was reportedly heard. The second hearing was postponed from 29 July to 2 August 2013 due to Mr Kharlamov’s lawyer’s illness. It is alleged that the evidence presented on 2 August was based on the opinions of psychologists and philologists, yet is being used to indict Mr. Kharlamov on criminal charges. It is alleged that given the lack of a criminal case against him, authorities may have shifted their focus to detaining him on grounds of insanity.

According to the latest information received, following the request from a State prosecutor to send the case for further investigation based on the Art. 303 of the Criminal Procedural Code (need to change the charges/indictment), on 13 August the court ruled to refer the case for further investigation. The court did not change the measure of restraint for Mr. Kharlamov and he reportedly remains in detention.

Very serious concern is expressed at the possibility that Ms. Zinaida Moukhortova’s current forced psychiatric confinement and Mr. Kharlamov’s continued detention, including temporary psychiatric confinement and evaluation, may be related to their work in defence of human rights. Further serious concern is expressed at Ms. Zinaida Moukhortova’s previous detention and forced medical treatment therein which, if administered while she was sane, would amount to torture or other cruel, inhuman or degrading treatment. In this connection, very serious concern is expressed at the alleged psychiatric evaluation and continued detention of Mr. Aleksandr Kharlamov and forced psychiatric hospitalization of Ms. Zinaida Moukhortova, particularly given allegations indicating a lack of evidence to suggest either of them is in need of such treatment.

Without expressing at this stage an opinion on the facts of the case and on whether the detention of the abovementioned persons is arbitrary or not, we would like to appeal to your Excellency’s Government to take all necessary measures to guarantee their right not to be deprived arbitrarily of their liberty and to fair proceedings before an

independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

We should like to appeal to your Excellency's Government to seek clarification of the circumstances regarding the cases of Ms. Zinaida Moukhortova and Mr. Aleksandr Kharlamov. We would like to stress that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth *inter alia* in the UDHR, the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which your Excellency's Government acceded on 26 August 1998.

In this context, and without in any way implying any conclusion as to whether Ms. Zinaida Moukhortova and Mr. Aleksandr Kharlamov suffer from a mental disability or not, we would like to draw the attention of your Excellency's Government to the 2013 report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/22/53) to the Human Rights Council, which states in paragraph 64 that both, the mandate and United Nations treaty bodies have established that involuntary treatment and other psychiatric interventions in health-care facilities can constitute forms of torture and ill-treatment (A/63/175, paras. 44, 47, 61, 63; Human Rights Committee, communication No. 110/1981, *Viana Acosta v. Uruguay*, paras. 2.7, 14, 15.) and that to the extent that they inflict severe pain and suffering, they violate the absolute prohibition of torture and cruel, inhuman and degrading treatment (A/63/175, paras. 38, 40, 41).

We would like to reiterate that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment believes that except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". As detention in a psychiatric context may lead to non-consensual psychiatric treatment, the Special Rapporteur states that deprivation of liberty that is based on the grounds of a disability and that inflicts severe pain or suffering could fall under the scope of the Convention against Torture (A/HRC/22/53, para. 69).

In this context, we wish to recall the absolute prohibition of torture and ill-treatment, as reiterated in paragraph 1 of Human Rights Council Resolution 16/23, adopted in April 2011, which "Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment."

Regarding the alleged temporary psychiatric confinement of Mr. Kharlamov and forced psychiatric hospitalization of Ms. Moukhortova, we would also appreciate information from your Excellency's Government on steps taken by the competent authorities to ensure the enjoyment of the right to health by the above human rights lawyers. This right is reflected, *inter alia*, in article 12 of the International Covenant on Economic, Social and Cultural Rights (ratified by Kazakhstan on 24 January 2006), which provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. We would also like to refer your Excellency's

Government to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which provides that States are under the obligation to respect the right to health by, inter alia, refraining from interfering directly or indirectly with the enjoyment of the right to health and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness, which is subject to specific and restrictive conditions, respecting best practices and applicable international standards (para.34). In this connection, the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991) provides that “[A] determination that a person has a mental illness shall be made in accordance with internationally accepted medical standards” and that “[A] determination of mental illness shall never be made on the basis of political, economic or social status, or membership of a cultural, racial or religious group, or any other reason not directly relevant to mental health status” (Principle 4).

Moreover, the right to health contains such freedoms as the right to control one’s health and body and to be free from interference, including from torture, non-consensual medical treatment and experimentation (para.8. General Comment No.14). As stated by the Special Rapporteur on the right to health in his 2009 report to the General Assembly, informed consent is a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services. Informed consent in health, including (but not limited to) clinical practice, public health and medical research, is an integral part of respecting, protecting and fulfilling the enjoyment of the right to health (para.18, A/64/272).

With regard to Mr. Kharlamov, we would like to respectfully remind your Excellency’s Government of article 18(1) of ICCPR, which states that “everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

As to the scope of the right to freedom of thought, conscience and religion, we would like to draw attention of your Excellency Government to the paragraphs 1 and 2 of the Human Rights Committee’s General Comment 2, which specify that Article 18 of ICCPR “[...] is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. [...] Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. [...]”

Furthermore, we would like to respectfully draw the attention of your Excellency’s Government to paragraph 48 of the General Comment 34, in which the Human Rights Committee observes that “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of

the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”

In this context we would like to draw attention of your Excellency’s Government to paragraph 4(f) of the Resolution 2005/40 of the former Commission on Human Rights, which urges States, “To ensure that no one within their jurisdiction is deprived of the right to life, liberty, or security of person because of religion or belief and that no one is subjected to torture or arbitrary arrest or detention on that account, and to bring to justice all perpetrators of violations of these rights.”

We would also like to appeal to your Excellency’s Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in article 19 of the ICCPR, that Kazakhstan ratified on 24 January 2006, which provides that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Regarding the case of the human rights lawyer, Ms. Zinaida Moukhortova, we would also like to refer your Excellency's Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and in particular:

- principle 8, which states: “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials;”
- principle 16, which states: “Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”;
- principle 17, which states: “Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities”;

- principle 23, which states: “Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”

In this connection, regarding allegations received indicating that the situation of Ms Zinaida Moukhortova and Mr. Aleksandr Kharlamov could be related to their human rights activities, we would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that “everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels” and that “each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice”.

Furthermore, we would like to bring to the attention of your Excellency's Government the following provisions of the Declaration:

- article 6 points b) and c) which provide that everyone has the right, individually and in association with others as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; and to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters;

- article 9 para. 3 point c) which provides that everyone has the right, individually and in association with others to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms; and

- article 12 paras 2 and 3 of the Declaration which provide that the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in

violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the physical and psychological integrity as well as the basic rights of Ms Zinaida Moukhortova and Mr. Aleksandr Kharlamov in compliance with the above international instruments.

Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the above summary of the case accurate?
2. Has a complaint been lodged by or on behalf of the alleged victims?
3. Please provide the details, and where available the results, of any investigation, and medical, judicial or other inquiries carried out in relation to this case. If no inquiries have taken place, or if they have been inconclusive, please explain why.
4. Please provide information concerning the legal grounds for the arrest and detention of Ms. Moukhortova and Mr. Kharlamov and how these measures are compatible with international norms and standards as stated, *inter alia*, in the UDHR and the ICCPR. Please provide information on whether all detainees have access to family members, legal counsel, and medical personnel.
5. Please indicate what measures have been taken to ensure that human rights defenders, including human rights lawyers, can operate in a safe and enabling environment and can carry out their legitimate activities without fear of harassment, stigmatization or criminalization of any kind.
6. With regard to prosecution of Mr. Kharlamov, please provide information in details on the specific measures undertaken in Kazakhstan to ensure the freedom of religion or belief, particularly of those professing atheist and non-theist beliefs. Please explain in details how these measures are compatible with paragraph 48 of the General Comment 34 of the Human Rights Committee.
7. Please provide information in details on the specific measures undertaken to implement paragraph 4(f) of the Resolution 2005/40 of the former Commission on Human Rights in Kazakhstan.
8. Please provide information on the legal grounds, medical determination and safeguards in place regarding the psychiatric detention of Mr. Kharlamov and forced psychiatric hospitalization of Ms. Moukhortova.

9. Please provide information on the measures taken to ensure the enjoyment of the right to the highest attainable standard of physical and mental health, including freedom from non-consensual medical treatment, by Ms. Moukhortova and Mr. Kharlamov.

We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned persons are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency's Government adopt effective measures to prevent the recurrence of these acts.

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

El Hadji Malick Sow
Chair-Rapporteur of the Working Group on Arbitrary Detention

Frank La Rue
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Anand Grover
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Margaret Sekaggya
Special Rapporteur on the situation of human rights defenders

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers

Heiner Bielefeldt
Special Rapporteur on freedom of religion or belief

Juan E. Méndez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment