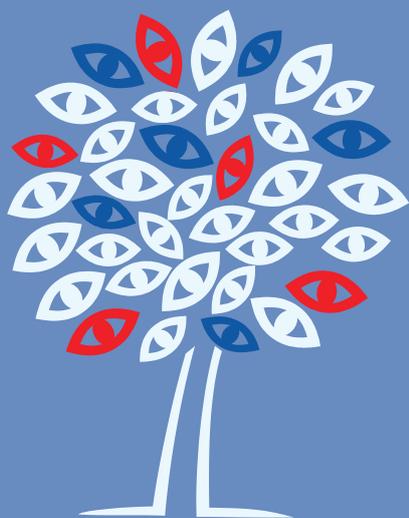


Organization for Security and Co-operation in Europe
Office for Democratic Institutions and Human Rights



Analytical Report

Judicial Authorization of Pre-trial Detention in the Republic of Kazakhstan

Warsaw, 2011

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Executive Summary

The Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE), in cooperation with the Supreme Court of Kazakhstan, the Prosecutor General's Office, and defence lawyers' associations implemented a project "Judicial authorization of pre-trial detention in the Republic of Kazakhstan."

The project team obtained statistical data from the Supreme Court and Prosecutor General's Office on judicial authorization of pre-trial detention in Kazakhstan between 2008 and 2010; examined 60 cases of judicial authorization by the Petropavlovsk city court, and the Almalý district court of the city of Almaty; surveyed 355 judges, 95 prosecutors and 169 defence lawyers; and researched publications and mass media coverage of issues related to judicial authorizations. Additionally, 269 detention authorization hearings and court hearings on extension or appeal of pre-trial detention were monitored in regional and district courts. The project involved 15 observers in 12 regions.

Project findings and analysis revealed the advantages and disadvantages of the existing procedure of authorization of pre-trial detention as a measure of restraint, which are presented in this report. The examination of this procedure leads the project team to conclude that the reforms carried out to date, which give the courts the power to authorize pre-trial detention, are a necessary but not a sufficient step to achieve full compliance with international standards in this area. These standards require that every arrested person is brought before a court for an assessment of the legality and justifiability of his/her arrest. Such an assessment is not carried out within the current procedure.

The project's study of court practices shows that the human rights potential of judicial authorization of pre-trial detention remains unfulfilled. Pre-trial detention remains the most common measure of restraint; courts do not use their powers to carry out complete and thorough examinations of the justifiability of the use and extension of this severe measure. In these circumstances, additional efforts should be made to make pre-trial detention not a rule for most accused but rather an exception, in line with Kazakhstan's international obligations. Special attention should be given to the expansion and development of alternative measures of restraint, including house arrest and bail, which are currently used very rarely. Judges should have the authority to choose measures of restraint themselves.

Examination of compliance of the existing procedure of judicial authorization of pre-trial detention revealed a number of positive aspects of this procedure. For example, in most hearings attended by the observers, participants were informed of their rights, the presence of the suspects/accused and defence lawyers was ensured, judges did not demonstrate prejudice or lack of objectivity to the hearing participants, court decisions were announced in full and the appellate procedure was explained by the judge.

At the same time the observers noticed some shortcomings, which require improvements to the legislation and to its application in practice: the principle of public hearing is not fully implemented; problems exist with the right to defence and the right to qualified legal assistance; as a rule, audio/video recording of hearings is not carried out, even where the requisite equipment is in place. It should be noted that despite all legal requirements, complaints of torture and other illegal investigation techniques are still not receiving due attention from the courts and prosecutors.

Hearings on the extension of detention attended by the observers give cause to doubt that the existing procedure properly protects individuals from arbitrary detention and ensures reasonable detention periods. These hearings are most often held in absence of the defendants. During the hearings the prosecutors and

investigators often do not prove that the grounds for continuing detention remain valid but rather report on their difficulties with conducting the investigation. Delays in investigation cannot justify extensions of detention terms and should be duly assessed by the courts.

Consolidated Recommendations

In order to bring the legislation on judicial authorization of pre-trial detention and the practice of its application in Kazakhstan into further compliance with international standards pertaining to the right to liberty:

1. Guarantee every person arrested in accordance with criminal, administrative or other procedure the right to be brought before the court within 48 hours from the moment of arrest, so that the legality and justifiability of his or her arrest may be assessed.
2. Expand the scope of the detention authorization hearing to include issues of legality and justifiability of arrest of the person in question. Until the relevant *habeas corpus* elements are incorporated into the Code of Criminal Procedure, Kazakhstan's judges should be guided by the relevant provisions of the International Covenant on Civil and Political Rights, as well as the Supreme Court's Normative Ruling No. 1 of 10 July 2008 regarding legality and justifiability of arrest for each authorization of pre-trial detention.
3. Examine the possibility of establishing specialized courts entrusted with control of the protection of human rights and the rule of law in criminal and administrative justice.

In order to ensure justifiability of selecting pre-trial detention as a measure of restraint:

4. Require criminal prosecution bodies to justify the selection of the measure of restraint before the court with references to specific evidence and appropriate reasoning.
5. Exclude reference to "the execution of the sentence" from Article 139 of the Code of Criminal Procedure as a ground for selection of the measure of restraint as it is inconsistent with the presumption of innocence.
6. Establish a legal and organizational framework for the effective implementation of alternative measures of restraint and vest the courts with the power to select the appropriate measure of restraint.
7. Cease the practice of authorizing detention based solely on the gravity of the charges.
8. Require the courts to provide detailed reasons for their decisions with respect to the arguments by both parties concerning the authorization of detention.
9. Amend the existing criminal procedural legislation by introducing provisions requiring full participation of the accused in court hearings on the extension of detention terms, and require criminal prosecution bodies to prove the necessity for the extension of detention and the reasons for not selecting a less restrictive measure of restraint.
10. When deciding on imposing or extending detention as a measure of restraint, courts should consider individual circumstances of each case and determine the term of detention on a case-specific basis.
11. Courts should monitor whether investigations are conducted without unreasonable delays; inefficiency on the part of law enforcement bodies should not justify detention.

In order to better guarantee the right to a public hearing:

12. Amend the law to include a provision for resolving detention authorization issues in a public hearing.
13. Make information on scheduled detention authorization hearings publicly available, including through posting on court websites.
14. Discontinue the practice of hearing cases in judges' offices.
15. Establish such access regimes to courts which, while guaranteeing the security and safety of judges

and preventing interference with the administration of justice, would also ensure that members of the public have an opportunity to be present in the courtroom in all cases permitted by the law.

In order to better guarantee the right to be informed of one's rights:

16. Provide in the law a specific list of rights of the suspect/accused during the authorization of detention and a procedure for explaining these rights. This procedure could be implemented in practice through, for example, providing a trial participant with an appropriate leaflet.

In order to better guarantee the right to a translator:

17. Regulate in the law guarantees of the right to quality translation. Courts must at all times ascertain whether the suspect/accused is proficient in the language of the proceedings or needs a translator. The translator and other participants in the proceedings must be informed of their rights and obligations with regard to the translation.
18. In order to provide for adequate quality of judicial translation establish a court (sworn) translator service, and discontinue the practice of involving persons without the relevant education and skills as translators.

In order to better ensure the right to defence and qualified legal assistance:

19. Consider introducing a requirement to inform the accused in writing of his/her right to receive legal assistance of his/her own choosing and of the relevant steps made by the accused in a separate protocol in advance of the detention authorization hearing.

In order to better guarantee the right to a fair and impartial hearing:

20. Each arrested person's case should be reviewed in a separate hearing and the practice of group hearings on detention authorization in respect of more than one accused should be abandoned.

In order to more effectively combat torture and the use of unlawful investigation techniques:

21. Amend the Code of Criminal Procedure, and ensure its implementation, to require the court not only to question the suspect/accused about the violations of their rights, but also to effectively verify these facts in all cases. In accordance with best practices in international human rights instruments, when examining complaints concerning torture and cruel treatment the burden of proof that the allegations are groundless should rest with the law enforcement bodies.

In order to improve other procedural aspects of authorizing pre-trial detention:

22. Amend the law to include effective procedural safeguards of due notification of interested participants in the proceedings of the time and venue of the hearing on detention authorization.
23. Regulate the procedure of presenting evidence at detention authorization hearings to ensure comprehensive and complete examination of the grounds for restricting the right to liberty, and to safeguard equality of arms and adversarial proceedings.
24. The powers of the criminal prosecution bodies in detention authorization hearings should be clearly delineated. The prosecutor should represent the State in court, as the official responsible for the prosecution who is tasked with making key procedural decisions at the pre-trial stage.

25. Consider amending the law to include an express requirement for the court to provide detailed information to participants in the detention proceedings of the terms and procedure of appeal of the relevant court ruling.
26. Transfer the decision-making on physical restraint to the exclusive competence of the judge. This will promote the judiciary's authority and facilitate the development of a more consistent practice in the use of restraining devices and security measures in respect of the suspects/accused.
27. Amend the law to include a requirement for complete audio recording of court hearings and making such recordings a mandatory part of the hearing minutes.

Introduction¹

The Constitution of the Republic of Kazakhstan enshrines as supreme values, human life, rights and freedoms². In the years since independence a number of steps have been taken to humanize and democratize both the legislation and practice in the area of criminal justice. Kazakhstan has ratified a number of international human rights treaties and taken action to incorporate their provisions in the domestic legislative framework. In particular, Kazakhstan has ratified the International Covenant on Civil and Political Rights (ICCPR), Article 9 of which requires every detained person to be delivered before a judicial authority to decide on the lawfulness of detention and continued deprivation of liberty.³

Following lengthy and heated debates in legal circles and the adoption of new constitutional provisions by Law No. 65-IV of 5 July 2008 on amendments to certain legislative acts of the Republic of Kazakhstan pertaining to the application of pre-trial detention and house arrest as measures of restraint, Kazakhstan's Code of Criminal Procedure (CCP) was amended to include provisions requiring judicial authorization of pre-trial detention. From 5 August 2008 the procedure has been put into practice.

The introduction of judicial authorization of pre-trial detention may be rightfully called an accomplishment in the democratization of criminal justice, since the procedure of selecting pre-trial detention as a measure of restraint has become public, adversarial and overseen by the judicial power. This constitutes an example of the harmonization of Kazakhstan's criminal procedure law with international norms.

At the same time, over a year and a half of experience in implementing this procedure warrant the conclusion that the human rights function of the institution of judicial authorization is in need of further improvement. Many participants of the second Expert Forum on Criminal Justice for Central Asia, organized by ODIHR in October 2009, emphasized the need for more research in this area, as well as the exchange of experiences between the countries of the region.

Kazakhstan as an OSCE participating State has committed to facilitate OSCE trial observation as a means to monitor compliance with international human rights and democracy standards. This procedure is stipulated in paragraph 12 of the 1990 Copenhagen Document and provides the legal basis for OSCE trial monitoring projects.⁴

Since the judicial system and law enforcement bodies have accumulated sufficient empirical data in the area of judicial authorization of pre-trial detention, ODIHR in cooperation with the Supreme Court of the Republic of Kazakhstan, the Prosecutor General's Office, and defence lawyers' associations implemented the present project. The project combined comprehensive analysis of the legislation and its implementation, including statistical analysis, research of court documents, and surveys of judges, prosecutors and defence lawyers, as well as observation of detention hearings, hearings to extend pre-trial detention, and appeal hearings.

In the course of implementation, the project team obtained statistical data from the Supreme Court and

1 The English version of this Report is a translation from its original Russian version. Consequently, many references contained herein are made to Russian-language sources. The names of these sources are not translated into English.

2 Constitution of the Republic of Kazakhstan, Article 1.

3 Available at <http://www.un.org/russian/document/convents/pactpol.htm>. Ratified by the Law of the Republic of Kazakhstan No. 91-III of 28 November 2005. Entered into effect on 24 April 2006 – see letter of MFA of 27 June 2006 No. 12-1-2/1445 at: http://online.prg.kz/doc/lawyer/?uid=5E5CE394-1CD4-4668-AC34-D6A683AFCC3F&language=rus&doc_id=30061953).

4 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Copenhagen 1990), OSCE Human Dimensions Commitments: Thematic Compilation, Volume II, 2nd Russian edition, Warsaw, 2006, p. 80 (hereinafter – “OSCE Commitments”).

Prosecutor General's Office on judicial authorization of pre-trial detention in Kazakhstan between 2008 and 2010; examined 60 case files on judicial authorization from the Petropavlovsk city court and Almaty district court of the city of Almaty; surveyed 355 judges, 95 prosecutors and 169 defence lawyers; and researched publications and mass media coverage on the issues of judicial authorization. With the purpose of gaining first-hand experience with court implementation, 269 detention authorization hearings and court hearings on extension or appeal of pre-trial detention were monitored in regional and district courts. The project involved 15 observers in 12 regions.

This report comprises four chapters. Chapter 1 gives an overview of international standards pertaining to the right to liberty. Chapter 2 provides an analysis of Kazakhstan's legislation and its implementation to assess their compliance with these international standards. Chapter 3 examines the safeguards against arbitrary detention in cases involving pre-trial detention. Chapter 4 reviews the current detention procedure in light of international fair trial guarantees. The report also includes general conclusions and recommendations to improve the functioning of this procedure and fulfil its human rights potential.

Preliminary results of this project were presented to the participants of the third Expert Forum on Criminal Justice for Central Asia, which took place in Dushanbe from 17 to 18 June 2010. ODIHR also discussed the draft version of this report with Kazakhstan's authorities at a round table held at the Supreme Court in Astana on 25 November 2010. ODIHR is hopeful that the project results will advance the reform of the judicial system and law enforcement, and will promote better effectiveness and humanization of criminal procedure. ODIHR expresses its appreciation of the support and assistance provided throughout the project implementation by the Supreme Court, Prosecutor General's Office, Union of Advocates of Kazakhstan, Almaty City Collegium of Advocates, and project experts.

Chapter 1. International standards pertaining to the right to liberty

1.1. Terminology

In order to clarify the definitions used in this report, it should be noted that international instruments, including ICCPR Article 9, include within the meaning of *detention* any deprivation of liberty. Unlike Kazakhstani criminal procedure, these documents make no distinction between the short-term (under 72 hours) deprivation of liberty of the suspect (*zaderzhanie* in Russian), and detention as a measure of restraint (*arest* in Russian), the latter being lengthier, up to several months, and authorized by a relevant official.

In accordance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereinafter referred to as the UN Body of Principles), adopted by the UN General Assembly on 9 December 1998, “arrest” means the act of apprehending a person for the alleged commission of an offence or by the action of an authority, and “detained person” means any person deprived of personal liberty except as a result of conviction for an offence.⁵ International law thus differs from the post-Soviet tradition in that it defines “arrest” as apprehending a person for the alleged commission of either a criminal or an administrative offence.⁶

The right to personal liberty, as a fundamental human right, may only be restricted in accordance with a procedure that has safeguards in place protecting the person against arbitrary interference with this right. As criminal procedure evolved, the basis for such procedure has been formed by the institution of *habeas corpus* (Latin meaning “you are to hold the body”). Historically the *habeas corpus* procedure represents a form of judicial oversight over the implementation of human rights safeguards applicable to detention and guarantees every detained person the right to face the court so that it may assess the lawfulness and justifiability of the detention.⁷ It is the principle of *habeas corpus* that provided the basis for ICCPR Article 9 and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁸

5 Adopted by UN GA Resolution 43/173 on 9 December 1988, available at: <http://www.un.org/russian/document/convents/detent.htm>.

6 Similar terms are used by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5). Provisions of the Convention and jurisprudence of the European Court of Human Rights are international standards for most countries of the OSCE region. The Convention has been signed and ratified by 47 out of 56 OSCE participating States. Relevant sections of this report refer to the jurisprudence of the European Court of Human Rights due to its significant impact on the formation and interpretation of international human rights standards, including those pertaining to the right to personal liberty. Kazakhstan is not a State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

7 The institution of *habeas corpus* originated in England. Article 39 of the Magna Carta, signed by King John of England in 1215, stipulates that “No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land” (see the full text of Magna Carta at: <http://www.fordham.edu/halsall/source/magnacarta.html>)

Legal consolidation of judicial control over detention was made with the Habeas Corpus Act, passed on 26 May 1679 by the English Parliament. The Habeas Corpus Act implementation practice formed the basis for contemporary procedural models that safeguard the right to liberty in accordance with international law. Pursuant to the Habeas Corpus Act every detained person could personally or by proxy petition the court to issue a writ of *habeas corpus*, which required the official of the detention facility to “bring or cause to be brought the body of the party so committed or restrained, unto or before the Lord Chancellor, or Lord Keeper of the Great Seal of England for the time being, or the judges or barons of the said court from which the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof” (see Habeas Corpus Act, available at: <http://www.krotov.info/acts/17/3/16790526.html>). In other words, the Act afforded English subjects the right to have the lawfulness and grounds of detention assessed by the court. The detainee was provided with an opportunity to face the court and hear the reason for the detention.

8 The European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), available at: <http://www.echr.ru/documents/doc/2440800/2440800-002.htm>.

1.2. OSCE commitments

OSCE commitments relating to the prohibition of arbitrary detention are laid down in detail in the Vienna Document, paragraph 23.1 of which requires the participating States to “ensure that no-one will be subjected to arbitrary arrest, detention or exile.”⁹ In the same document, the OSCE participating States committed to observing the UN Standard Minimum Rules for the Treatment of Prisoners, as well as the UN Code of Conduct for Law Enforcement Officials¹⁰, which contain important guarantees of the right to liberty.

Paragraph 5.15 of the Copenhagen Document states that “any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function.”¹¹

The Moscow Document requires that the participating States “ensure that law enforcement acts are subject to judicial control, that law enforcement personnel are held accountable for such acts, and that due compensation may be sought, according to domestic law, by the victims of acts found to be in violation of the above commitments.”¹² The same document requires the participating States to ensure that “any person arrested or detained will have the right to be brought promptly before a judge or other officer authorized by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful.”¹³ The participating States must also ensure that “anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.”¹⁴

The Final Report of the OSCE Supplementary Human Dimension Meeting on the Prevention of Torture (6-7 November 2003) recommends that “[i]n a number of OSCE participating States, measures providing for the right to *habeas corpus* should be enacted and implemented within months, not years”¹⁵ and that the OSCE strategy for the prevention of torture should “prioritize Central Asian countries in the promotion and implementation of *habeas corpus* reform.”¹⁶

1.3. UN standards

Article 3 of the Universal Declaration of Human Rights guarantees everyone “the right to life, liberty and security of person.”¹⁷ The Declaration also stipulates the general principle requiring that any restrictions of fundamental human rights, such as the right to liberty, shall be judicially protected.¹⁸

9 See Concluding Document of the Vienna Follow-up Meeting of the CSCE (1989). OSCE Thematic Compilation, p. 53. A similar provision is contained in the Charter of Paris for a New Europe (1990), which states that “no one will be: ... subject to arbitrary arrest or detention”; *op. cit.* OSCE Commitments, p. 94.

10 Paragraph 23.3 of the Concluding Document of the Vienna Follow-up Meeting of the CSCE (1989).

11 *Op. cit.* OSCE Commitments, p. 76.

12 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), *op. cit.* OSCE Commitments, p. 127.

13 *Id.*, paragraph 23.1.

14 *Id.*, paragraph 24.

15 Supplementary Human Dimension Meeting on the Prevention of Torture, Final Report, Vienna, 6-7 November 2003, available at: http://www.osce.org/documents/odihhr/2004/01/1896_en.pdf, p. 8.

16 *Id.*, p. 43.

17 The Universal Declaration of Human Rights was adopted and declared by resolution 217 A (111) of the UN General Assembly of 10 December 1948, available at: <http://www.un.org/russian/document/declarat/declhr.htm>.

18 *Id.*, Article 8

ICCPR Article 9(4) provides for a *habeas corpus* guarantee or a similar mechanism of judicial assessment of any restriction of personal liberty.¹⁹ In accordance with this provision, “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”²⁰ Article 9(4) is intrinsically related to ICCPR Articles 2(3) and 9(3).²¹ Similar provisions are contained in ECHR Article 5.²²

Principle 32 of the UN Body of Principles specifies the procedure provided for by ICCPR Article 9(4). In accordance with the provision, the detainee or his/her lawyer is entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of detention in order to obtain release without delay, if it is unlawful. The proceedings shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

The UN has repeatedly indicated to its Member States the need to introduce legislative provisions reflecting the requirements of ICCPR Article 9(4). In particular, in 1992 the Commission on Human Rights called on states “that have not yet done so to establish a procedure such as *habeas corpus* by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful” and to “maintain the right to such a procedure at all times and under all circumstances, including during states of emergencies.”²³

The UN Working Group on Arbitrary Detention since its inception has recommended the UN Member States to strengthen the *habeas corpus* procedure as a safeguard against arbitrary detention. The Working

19 Special rapporteurs of the UN Sub-Commission on the Promotion and Protection of Human Rights noted in their report that “Articles 2 (3), 9 (3), and 9 (4) embody the essential characteristics of amparo and habeas corpus even though the words “in the nature of habeas corpus” from earlier drafts of the Covenant were deleted to allow States the freedom to fashion remedies through their own legal systems” (Paragraph 149). See *The right to a fair trial: current recognition and measures necessary for its strengthening*, Final report prepared by Stanislav Chernichenko and William Treat, 3 June 1994, E/CN.4/Sub.2/1994/24, available at: <http://www.unhcr.org/refworld/docid/3b00f3fe4.html>.

20 The UN Working Group on Arbitrary Detention summarizes this viewpoint as follows: “Habeas corpus is a legal procedure which is an undeniable right of all individuals and one of the most effective remedies against challenging arbitrary detention. Article 9(4) of the International Covenant on Civil and Political Rights incorporates this right, namely the possibility to institute habeas corpus or similar proceedings, personally or on behalf of detained persons, challenging the lawfulness of detention before a court of law that is competent to order their release in the event that the detention is unlawful” (paragraph 76), Report of the Working Group on Arbitrary Detention, Chairperson-Rapporteur: El Hadji Malick Sow, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_AEV.pdf A/HRC/13/30.

21 Unlike ICCPR Article 9(4), Article 9(3) only concerns those detained for the alleged commission of a criminal offence. Article 9(4) applies to all cases involving detention, including detention ordered by an administrative body. The UN Human Rights Committee ruled that a person detained by an administrative body shall have the right to have the relevant decision reviewed by a court (Communication No. 265/1987, *Antti Vuolanne v. Finland* (7 April 1989), U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989). ICCPR Article 2(3) provides for the guarantees of judicial protection of fundamental human rights.

22 Article 5 provides that “4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

23 Adopted on 28 February 1992. (Report of the UN Commission on Human Rights on its forty-eighth session, 1992 (E/1992/22-E/CN.4/1992/84), Chapter II, Section A). See ПРАВА ЧЕЛОВЕКА И ПРЕДВАРИТЕЛЬНОЕ ЗАКЛЮЧЕНИЕ. СБОРНИК МЕЖДУНАРОДНЫХ СТАНДАРТОВ, КАСАЮЩИХСЯ ПРЕДВАРИТЕЛЬНОГО ЗАКЛЮЧЕНИЯ. ООН: Нью-Йорк, Женева, 1994, at p.75, available at: <http://www.unrol.org/files/training3ru.pdf> (Hereinafter - “ПРАВА ЧЕЛОВЕКА И ПРЕДВАРИТЕЛЬНОЕ ЗАКЛЮЧЕНИЕ”). The UN Human Rights Committee has reiterated that detention in connection with “prompt security measures” constitutes a violation of Article 9(4), since such measures prevent the detainee from resorting to the habeas corpus or a similar judicial procedure. See *Adolfo Drescher Caldas v. Uruguay*, at p. 82, para. 14, Communication No. 43/1979, U.N. Doc. C/OP/2 at 80 (1990), available at: <http://www1.umn.edu/humanrts/undocs/newscans/43-1979.html> and *David Alberto Cámpora Schweizer v. Uruguay*, at p. 93, para. 19. Communication No. 66/1980, U.N. Doc. C/OP/2 at 90 (1990), available at: <http://www1.umn.edu/humanrts/undocs/newscans/66-1980.html>.

Group has expressed regret that “in many countries *habeas corpus* actions do not exist or have been suspended or are not readily available or relied on very little” and that “*habeas corpus* is one of the most effective means to combat the practice of arbitrary detention.” As such, it should not be regarded as a mere element in the right to a fair trial but, in a country governed by the rule of law, as a personal right which cannot be derogated from even in a state of emergency.²⁴

The UN Human Rights Committee also stated that the right to resort to *habeas corpus* should be extended to allow the family or friends of the detainee to petition for *habeas corpus* on his or her behalf. In the Committee’s opinion, the extension of *habeas corpus* right to third parties makes the procedure more effective.²⁵

1.4. Requisite elements for the implementation of ICCPR Articles 9(3) and (4) in criminal proceedings

1.4.1. Expedited procedure for the delivery of the arrestee before the judicial authority

Habeas corpus safeguards should be promptly provided to any person detained by a state body. The detained person shall be first and foremost afforded the right to be brought promptly before a judicial body, whose function is to assess whether the detention is legitimately justified and if it is necessary to remand the person. This procedure provides the first opportunity for the detained person or his/her defence lawyer to petition for release if the detention is in breach of the apprehended person’s rights.²⁶

In other words, the law enforcement body or prosecutor in question must ensure that the apprehended person is brought before the court within the timeframe set by the law. Otherwise the detention is deemed unlawful.

The time of arrest before the person is brought before the court may vary. However, ICCPR General Comment No. 8 clarifies that “delays must not exceed a few days.”²⁷ Moreover, the Human Rights Committee members have expressed an opinion that a 48-hour arrest term without access to court is unjustifiably long, and have called on the states concerned to shorten this timeframe.²⁸

1.4.2. Assessment of the legality of arrest

In accordance with CCPR General Comment No. 8, the important guarantee of judicial review of legality of the detention applies to all persons deprived of their liberty by arrest or detention.²⁹

Principle 11 of the UN Body of Principles provides that a person “shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.” Furthermore, Principle 32 clarifies that “a detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful. The proceedings referred to in paragraph 1 of

24 Report of the Working Group on Arbitrary Detention, Chairperson-Rapporteur El Hadji Malick Sow (paragraph 78), available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_AEV.pdf A/HRC/13/30.

25 UNGA reports, forty-fourth session, Add. 40 (A/44/40), (Netherlands) in Op. cit. ПРАВА ЧЕЛОВЕКА И ПРЕДВАРИТЕЛЬНОЕ ЗАКЛЮЧЕНИЕ, at p.76 (paragraph 173).

26 Id, p. 30 (paragraph 58).

27 CCPR General Comment No. 8, paragraph 2, available at: <http://www1.umn.edu/humanrts/russian/gencomm/Rhrcom8.html>.

28 UN GA Official Reports, forty-fifth session, Add. 40 (A/45/40), volume I, paragraph 333 (Germany) in op. cit. ПРАВА ЧЕЛОВЕКА И ПРЕДВАРИТЕЛЬНОЕ ЗАКЛЮЧЕНИЕ, p. 32.

29 Op. cit. CCPR General Comment No. 8, paragraph 1.

the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”³⁰

In the case of *Womah Mukong v. Cameroon*, the UN Human Rights Committee made it clear that it understands arbitrariness of detention broadly and includes such notions as inappropriateness, injustice, lack of predictability and due process of law.³¹

It should be noted that an assessment of the lawfulness of detention is impossible without an assessment of justifiability of the suspicion in respect of the person facing criminal charges. This requirement has been reflected in the legislation of most OSCE participating States where a *habeas corpus* mechanism is in place. This is the approach of the law in Canada, Germany, Italy and the United States of America, where courts in the course of applying the *habeas corpus* procedure must review the justifiability of the suspicion.³² This approach is also shared by the European Court of Human Rights³³ and international human rights organizations.³⁴

Therefore, in assessing the lawfulness of detention, a judge should to a certain extent consider the justifiability of the charges and be given an opportunity to refuse to authorize detention and recognize it as unlawful if serious doubts arise in respect of the existence of material elements of the offence or that the crime was committed by the person in question. In other words, “the judge must be convinced that charges against the person taken into custody are not unfounded, that the suspicion or charges are supported at this stage by probable cause to believe that the person in question is implicated in the alleged crime and that the crime has been properly qualified. Otherwise, the detention would be arbitrary.”³⁵

30 Adopted by UN GA resolution 43/173 of December 8, 1988, available at: <http://www.un.org/russian/documen/convents/detent.htm>.

31 *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. C/51/D/458/1991 (1994), available at: <http://www1.umn.edu/humanrts/undocs/html/458-1991.html>

32 See Н.П. Ковалев. ОСНОВАНИЯ ДЛЯ АРЕСТА И ЗАКЛЮЧЕНИЯ ПОД СТРАЖУ ПОДОЗРЕВАЕМОГО (ОБВИНЯЕМОГО), available at: <http://fin.zakon.kz/101189-rol-prokurora-v-ugolovnom-processe-na.html>.

33 “The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices.” (*Labita v. Italy*, 26772/95). “The reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention ... Having a “reasonable suspicion” pre-supposes the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence. However, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at a later stage in the process of criminal investigation.” (К.-Ф. v. Germany, ECtHR Judgment, 27 November 1997, para. 57.). Cit. in Сальвиа, Микеле де. ПРЕЦЕДЕНТЫ ЕВРОПЕЙСКОГО СУДА ПО ПРАВАМ ЧЕЛОВЕКА. РУКОВОДЯЩИЕ ПРИНЦИПЫ СУДЕБНОЙ ПРАКТИКИ, ОТНОСЯЩИЕСЯ К ЕВРОПЕЙСКОЙ КОНВЕНЦИИ О ЗАЩИТЕ ПРАВ ЧЕЛОВЕКА И ОСНОВНЫХ СВОБОД.- Спб., 2004, pp. 209-210.

34 According to Amnesty International’s Fair Trials Manual, every detained person should be brought promptly before a judge or other judicial officer “to assess whether sufficient legal reason exists for the arrest; to assess whether detention before trial is necessary; to safeguard the well-being of the detainee; and to prevent violations of the detainee’s fundamental rights.” *Международная амнистия. РУКОВОДСТВО ПО СПРАВЕДЛИВОМУ СУДОПРОИЗВОДСТВУ*. - М., «Права человека», 2003, p. 49

35 С.А. Пашин. АНАЛИЗ ЗАКОНОДАТЕЛЬСТВА СТРАН ЦЕНТРАЛЬНОЙ АЗИИ (КАЗАХСТАН, УЗБЕКИСТАН, КЫРГЫЗСТАН) О ВВЕДЕНИИ СУДЕБНОГО САНКЦИОНИРОВАНИЯ АРЕСТА. Центр исследования правовой политики (LPRC), Almaty, 2009, p. 15, also available at: http://www.lprc.kz/ru/index.php?option=com_content&task=view&id=74.

Chapter 2. Compliance of the legislation and practice of judicial authorization of pre-trial detention in the Republic of Kazakhstan with international standards pertaining to the right to liberty

2.1 The procedure of applying pre-trial detention as a measure of restraint in accordance with the legislation of the Republic of Kazakhstan

The procedure of applying detention as a measure of restraint is stipulated by Article 150 of the CCP. In accordance with its provisions, the prosecutor, investigator or inquest body may issue a decision to initiate a motion before the court for authorizing detention. The decision to motion is accompanied by the case file that should contain substantiating information. In deciding whether to support the motion, the prosecutor must review the substantiating materials in their entirety and has the right to interrogate the suspect or accused. Having reviewed the relevant materials, the prosecutor issues the decision to support the motion by the investigator or inquest body for authorizing detention. If the prosecutor refuses to support the motion, the prosecutor issues a decision on rejection of support for the motion by the investigator or the inquest body for authorising detention of the suspect or the accused. The prosecutor must submit the decision to support the motion along with the substantiating materials to the court at least 12 hours in advance of the expiration of the arrest term.

The motion by the body of criminal prosecution for authorizing pre-trial detention as a measure to secure appearance of the suspect or accused, if supported by the prosecutor, is subject to consideration by a judge of the district or equivalent court in a hearing with participation of the suspect or the accused, prosecutor and the defence lawyer. The motion must be considered within eight hours from the submission of materials to the court that has territorial jurisdiction over the locality where the investigation is conducted or where the suspect was apprehended. The hearing participants may also include the legal representative of the suspect or the accused, the victim, and his or her legal representative or representative. Failure by a hearing participant to appear does not impede the hearing. Minutes (*protokol*) of the hearing shall be made.

The court consideration of the motion for authorizing pre-trial detention as a measure of restraint in the absence of the accused is only permitted where the accused is absconding or out of the country or has failed to appear before the investigation body despite a proper prior notification of the time, date and venue of the court hearing.

In the beginning of the hearing the judge announces the motion to be considered and clarifies to the persons present their rights and obligations. Then the prosecutor substantiates the necessity to apply pre-trial detention as a measure of restraint of the suspect or the accused, after which other hearing participants are heard.

Upon having reviewed the motion for authorizing pre-trial detention as a measure of restraint of the suspect or the accused, the judge rules on authorizing the detention or refusing authorization. In the case authorization is refused, the judge, at the motion of the prosecutor, has the right to rule in the same hearing on authorizing home detention as a measure of restraint.

The court ruling is immediately directed to the body of criminal prosecution that motioned the court for authorizing pre-trial detention, as well as to the prosecutor, the accused, the suspect, and the victim, and is subject to immediate implementation.

In considering the issue of pre-trial detention, the court restricts itself to reviewing the materials that concern the circumstances taken into account in selecting the said measure of restraint.

Kazakhstan's Supreme Court adopted Normative Ruling No. 1 of 10 July 2008 "On the application of provisions of international treaties to which the Republic of Kazakhstan is a State Party".³⁶ In particular, paragraph 11 of the Normative Ruling specifies that "the courts shall, where required, be governed by the provisions of the International Covenant on Civil and Political Rights ... ratified by the Parliament on 28 November 2005, in order to implement the obligations of the Republic of Kazakhstan as a State Party to the said treaty," while paragraph 13 provides that "ICCPR Article 9(1) guarantees everyone the right to liberty and security of person. No one may be arbitrarily detained or arrested. This implies that every person detained on a suspicion of having committed a criminal offence shall be entitled to be brought before the court to have the legality of his/her detention assessed and the measure of restraint decided upon. Hearings on the authorization of detention in accordance with CCP Article 14 must therefore include an assessment of justifiability and legality of detention of the person apprehended on a suspicion of having committed a crime."

2.2. Implementation of international standards in the national law

2.2.1 The right to appear before a court for review of legality of arrest

As noted above, international law guarantees every arrested person the right to be brought before the court, so that the legality of his/her arrest can be assessed. The main role of the court is to exercise this control function, and only then determine the form of procedural restraint that should be applied to the accused.

Currently in Kazakhstan the right to be brought before the court is not guaranteed to every arrested person. It is provided only to the persons with respect to whom the investigation decides to apply pre-trial detention. Obviously, those released after the "short-term" custody of up to 72 hours or those detained in accordance with administrative procedures are not afforded mandatory judicial protection. They may only submit a petition to the court on their own initiative.

This results in a situation where a significant number of potentially unlawful interferences with the right to liberty are left without any attention by the judicial system, which contravenes ICCPR Article 9. Full compliance with international standards necessitates the introduction of a procedure whereby **every arrested person** would be brought promptly before a judge so that the legality and justifiability of his/her arrest may be assessed.

With respect to Kazakhstan, the UN Human Rights Committee has recommended that "[t]he State party... take steps to shorten the current 72-hour pre-trial detention period and avoid prolonged arrest and detention prior to trial."³⁷ The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment recommended that Kazakhstan "[r]educe the period of police custody to a time limit in line with international standards (maximum 48 hours)."³⁸

36 Available at: <http://www.zakon.kz/117905-normativnoe-postanovlenie-verkhovnogo.html>.

37 Paragraphs 121-129, Concluding Observations of the Committee against Torture, Report of the Committee against Torture, Twenty-fifth Session (13-24 November 2000), Twenty-sixth Session (30 April-18 May 2001), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/436/26/PDF/G0143626.pdf?OpenElement>.

38 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment - Mission to Kazakhstan, A/HRC/13/39/Add.3, p. 19, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/175/80/PDF/G0917580.pdf?OpenElement/>.

In light of this it is recommended to provide for an appropriate judicial authorization procedure in Kazakhstan, whereby each detained individual, whether on the basis of criminal procedural or administrative grounds, would be brought before a judge no later than 48 hours from the moment of actual deprivation of liberty and, together with his/her chosen or appointed counsel, take part in the review of the legality of his/her detention and application of a measure of restraint.

2.2.2 The requirement to review legality and justifiability of arrest

Comparison of the above international standards and the procedure of judicial authorization of pre-trial detention provided for by Kazakhstan's CCP supports the conclusion that the implementation of international standards in national legislation is incomplete. CCP Article 132 grants to the investigation body the power to keep a person apprehended on the suspicion of having committed a criminal offence in custody for up to 72 hours. The oversight of the legality of arrest remains a prosecutorial function, since the court is not entitled to assess at its own initiative the legality and justifiability of such deprivation of liberty. When considering a prosecutor's confirmation of support for the investigator's motion for detention, the court may only authorize or refuse to authorize detention (CCP Article 150). The court therefore functions only as a body that may or may not agree with the prosecution's proposal to detain the suspect or the accused. Where the investigation or inquest body decides not to detain the suspect or the accused but to apply an alternative measure of restraint, the court may be entirely removed from the process of assessing the legality of arrest.

Analysis of the national law reveals that Kazakhstan implemented only paragraph 3 of ICCPR Article 9, which provides for a judicial decision on selecting pre-trial detention for persons awaiting trial.³⁹ Law No. 65-IV of the Republic of Kazakhstan of 5 July 2008 amended the CCP to provide for judicial authorization of the pre-trial detention as a measure of restraint. At the same time, the law did not provide for an assessment of legality of the arrest itself. This does not fully correspond to ICCPR Article 9 and the definition of arrest contained in the UN Body of Principles.

Despite the Supreme Court's Normative Ruling No. 1 of 10 July 2008, requiring courts to assess justifiability and legality of detention of the persons arrested on a suspicion of having committed a crime, this is rarely implemented in practice.⁴⁰ The project monitoring showed that judges avoid assessing the justifiability of the suspicion, referring to CCP Article 150(7) which provides that in deciding on issues concerned with the authorization of detention the court shall restrict itself to examining the materials related to circumstances to be considered in selecting the mentioned measure to secure appearance. A standard response by the court to requests by the defence to note the lack of evidence supporting the implication of the suspect in the alleged offence is that this goes beyond the scope of the hearing on authorizing detention.⁴¹ This approach effectively strips the courts of the responsibility to carry out judicial control, since it allows the investigative and prosecuting bodies to apply detention in respect of a wide circle of persons without sufficient substantive grounds.

39 At the same time courts did not receive powers to select pre-trial measures of restraint. They have the powers to only authorize detention and house arrest if the prosecutor motions for the latter.

40 A study of 60 case files concerning the authorization of detention within the framework of the project, as well as observation of 269 detention hearings in regional, district and equivalent courts revealed one case where the Normative Ruling was applied.

41 AK-16-K-R, KOS-4-K-R, UR2-18-K-R etc. S.A. Pashin points out this legislative deficiency, specifying that "it is quintessential that the law provide for a clearly defined range of facts, each of which must be supported by valid evidence before the motion of the body of criminal prosecution to detain is satisfied." In Pashin's opinion, the most serious gap in the legislative regulation of authorizing pre-trial detention is created by the lack in the CCP of an express requirement to assess the sufficiency of the grounds for suspicion and charges. In Pashin's view, the lack of a similar legal imperative creates fertile soil for breaches of the prohibition on arbitrary detention. See S.A. Pashin, *op. cit.*, p. 17.

In its Concluding Observations in respect of the Republic of Kazakhstan (December 2008), the UN Committee against Torture stressed that Kazakhstan does not provide a full set of safeguards at the initial stages of detention. In particular, the Concluding Observations noted “[f]ailure to introduce through the legal reform of July 2008 *habeas corpus* procedure in full conformity with international standards.”⁴²

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also noted in his 2009 report that “[o]ne crucial safeguard in the context of the prevention of torture and ill-treatment is a review by an independent judge of detention at an early stage. Even though Kazakhstan handed over the process of sanctioning arrest to the judiciary in 2008, the Committee against Torture expressed the view that the new process was not a fully-fledged *habeas corpus* proceeding in line with international standards.”⁴³

Judicial specialization as a method of improving the procedure for authorizing detention

CCP Article 150(7), which requires that in a hearing on authorizing detention the court restrict itself to examining the materials related to circumstances to be considered in selecting the mentioned measure to secure appearance, is believed to have been intended by the legislator to prevent judges from assuming prosecutorial bias, since there exists a concern that, if given access to the case before the trial, the judge may be misled by incomplete or unverified evidence and form a wrong stance on the case as a result of such prejudice. Obviously, at the stage of authorizing pre-trial detention there is no need to prove the guilt of the suspect or the accused to the same standard as in the trial. The court should merely assess admissible evidence that supports the reasonableness of the suspicion. However, the noted concerns make it worthwhile to study best practices from other OSCE participating States where detention is authorized by specialized judges, separate from trial judges.⁴⁴ This minimizes the negative impact of “corporate solidarity” and provides greater assurance for impartiality in the administration of justice.⁴⁵

The reasons for this judicial structure are “firstly, to eliminate the risk of biased attitude on the part of the judge towards the defendant; secondly, to ensure specialization of judges in issues concerning the

42 Paragraph 9 (c), Concluding Observations of the Committee against Torture (Kazakhstan). CAT/C/KAZ/CO/212, December 2008, available at: <http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.KAZ.CO.2.doc>.

43 Paragraph 69, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment - Mission to Kazakhstan (A/HRC/13/39/Add.3), available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/102/63/PDF/G0510263.pdf?OpenElement>.

44 For instance, in Germany oversight of the protection of human rights and freedoms is exercised by a specialized judge (Ermittlungsrichter), who does not participate in hearings on the merits and does not oversee preliminary investigation. See Н.П. Ковалев. ЗАКЛЮЧЕНИЕ ПОД СТРАЖУ ПО РЕШЕНИЮ СУДА В РЯДЕ ЕВРОПЕЙСКИХ СТРАН (ГЕРМАНИЯ, ИТАЛИЯ, АНГЛИЯ, ФРАНЦИЯ) available at: <http://www.consult.kz/index.php?uin=1178524359&chapter=1200910835>.

Note that France distinguishes between investigative judges and “freedom and detention” judges, i.e. those who directly exercise judicial control. See Л.В.Головко. ИНСТИТУТ СУДЕБНОГО КОНТРОЛЯ ЗА ПРЕДВАРИТЕЛЬНЫМ ЗАКЛЮЧЕНИЕМ ПОД СТРАЖУ В КОНТИНЕНТАЛЬНЫХ ФОРМАХ УГОЛОВНОГО ПРОЦЕССА. Центр исследования правовой политики (LPRC), available at: http://www.lprc.kz/ru/index.php?option=com_content&task=view&id=112.

The Reference Guide to Criminal Procedure, developed by the Brussels Working Group in 2006, mentions in paragraph 2.3.2. that “a judge deciding on a case shall not have any involvement at any prior stage of the criminal procedure.” OSCE, Vienna, 2007, p. 19, available at: <http://polis.osce.org/library/f/3071/1897/OSCE-AUS-RPT-3071-RU-Справочное%20руководство%20по%20уголовному%20процессу.pdf>

45 Note that the introduction of this idea in Kazakhstan was supported by G.H. Nasyrov in 2007. See Г.Х. Насыров. НЕ НАСТУПИТЬ БЫ НА ОДНИ И ТЕ ЖЕ ГРАБЛИ, available at: <http://www.zakon.kz/92608-ne-nastupit-by-na-odni-i-te-zhe-grabli.html>. A similar proposal is contained in the report of the Astana branch of the Kazakhstan International Bureau for Human Rights and Rule of Law. See САНКЦИОНИРОВАНИЕ АРЕСТА СУДОМ. ДОКЛАД ПО РЕЗУЛЬТАТАМ МОНИТОРИНГА, ПРОВЕДЕННОГО В СУДАХ Г.Г. АКТАУ, АЛМАТЫ, АСТАНА, КОСТАНАЙ, ОСКЕМЕН И ПАВЛОДАР. Astana, 2010, pp. 16-17.

authorization of pre-trial detention; thirdly, to relieve trial judges from an additional function; fourthly, to prepare for the transfer of other functions concerning procedural actions that interfere with constitutional rights (such as search warrants, wiretapping, etc.) from the prosecution bodies to a specialized judge.”⁴⁶ The latter is important in view of the fact that gradual expansion of the scope of judicial oversight at the pre-trial stage and strengthening of safeguards to protect citizens’ rights and freedoms and their privacy have been identified as priorities for the development of the state criminal procedure policies.⁴⁷

Recommendations

Guarantee every person arrested in accordance with criminal, administrative or other procedure the right to be brought before the court within 48 hours from the moment of arrest, so that the legality and justifiability of his or her arrest may be assessed.

Expand the scope of the detention authorization hearing to include issues of legality and justifiability of arrest of the person in question. Until the relevant *habeas corpus* elements are incorporated in the CCP, Kazakhstan’s judges should be guided by the relevant ICCPR provisions, as well as the Supreme Court’s Normative Ruling No. 1 of 10 July 2008 regarding legality and justifiability of arrest for each authorization of pre-trial detention.

Examine the possibility of establishing specialized courts entrusted with control of the protection of human rights and the rule of law in criminal and administrative justice.

46 Н.П. Ковалев. СУДЕБНОЕ САНКЦИОНИРОВАНИЕ АРЕСТА В КАЗАХСТАНЕ: КОММЕНТАРИИ К ПРОЕКТУ ЗАКОНА РЕСПУБЛИКИ КАЗАХСТАН «О ВНЕСЕНИИ ИЗМЕНЕНИЙ И ДОПОЛНЕНИЙ В НЕКОТОРЫЕ ЗАКОНОДАТЕЛЬНЫЕ АКТЫ РЕСПУБЛИКИ КАЗАХСТАН ПО ВОПРОСАМ ПРИМЕНЕНИЯ МЕРЫ ПРЕСЕЧЕНИЯ В ВИДЕ АРЕСТА», available at: http://lex.kz/netcat_files/114/60/h_aedbe597e766a88eda9e4f02093935f4.

47 See Decree of the President of the Republic of Kazakhstan No. 858 of August 24, 2009 on the Concept of Legal Policy of the Republic of Kazakhstan for 2010-2020, available at: <http://www.minplan.kz/about/7931/24942/>.

Chapter 3. Verification of justifiability of selecting pre-trial detention as a measure of restraint

3.1 International standards

In accordance with ICCPR Article 9(3), pre-trial detention should not be the rule, however, release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Principle 28 of the UN Body of Principles provides that a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Detention should only be applied as a measure of last resort and only where grounds exist to believe that only deprivation of liberty of the accused would guarantee unimpeded proceedings.⁴⁸ Persons facing criminal prosecution should be given the possibility to present guarantees of appropriate conduct allowing them to retain their freedom throughout the proceedings.

The Committee of Ministers of the Council of Europe also recommends that “the remand in custody of persons suspected of an offence shall be the exception rather than the norm” and spells out the following conditions necessary for remand in custody: a reasonable suspicion that the person committed an offence; substantial reasons for believing that, if released, he or she would either abscond, or commit a serious offence, or interfere with the course of justice, or pose a serious threat to public order; there is no possibility of using alternative measures to address the concerns referred to above; and this is a step taken as part of the criminal justice process.⁴⁹ The Explanatory Memorandum to this Recommendation notes that the mentioned conditions “reflect the case law of the European Court of Human Rights and are cumulative so that [detention] cannot be imposed or continued if any one of them is absent or ceases to be operative.”⁵⁰ Thus, for example, the gravity of the charges alone cannot serve as a ground for detention.⁵¹

The UN Human Rights Committee holds a similar view. A brief summary of the case of *Michael and Brian Hill v. Spain* (1993) is provided below. This is a leading case of the UN Human Rights Committee on the issue of lawfulness of selecting detention as a measure of restraint.

Michael and Brian Hill v. Spain

In the case of *Michael and Brian Hill v. Spain*⁵², reviewed by the UN Human Rights Committee (Communication No. 526/1993), the authors of the communication, British nationals, were detained for

48 “Pre-trial detention is an exceptional decision made by a Judge when other measures to guarantee public safety and/or the collection of evidence or other prerequisites for adequate investigation or prosecution have failed or will fail. Such detention shall last no longer than strictly necessary.” See paragraph 3.3.1, OSCE Reference Guide to Criminal Procedure. OSCE Vienna, 2007. At p. 22. Available at: <http://polis.osce.org/library/f/3071/1897/OSCE-AUS-RPT-3071-RU-Справочное%20руководство%20по%20уголовному%20процессу.pdf>.

49 Council of Europe, Recommendation Rec(2006)13 of the Committee of Ministers to member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM>.

50 Explanatory Memorandum for Recommendation Rec (2006) 13, CM (2006) 122 Addendum, 30 August 2006, paragraph 7, available at: [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM\(2006\)122&Language=lanEnglish&Ver=add&Site=CM.&BackColorIntern et=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2006)122&Language=lanEnglish&Ver=add&Site=CM.&BackColorIntern et=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

51 See also *Nikolov v. Bulgaria*, ECtHR Judgment, 30 January 2003, paragraph 70.

52 *Hill v. Spain*, U.N. Doc. CCPR/59/D/526/1993, 2 April 1997.

allegedly setting on fire a bar, and later (on 17 November 1986) convicted by the High Court of Valencia and sentenced to six years and one day of imprisonment. The Hill brothers appealed the sentence. On 14 July 1988 the court on the basis of CCP Article 504 released them on bail until the appellate review. After the appeal was turned down by the Supreme Court, the convicted brothers left Spain for their homeland, where they addressed the UN Human Rights Committee with a complaint alleging that they had been denied due process.

In particular, Michael and Brian Hill complained that, in contravention of ICCPR Article 9(3), according to which pre-trial detention should not be the rule, they were not granted a possibility of bail.

The State objected, maintaining that the detention was justified in that the defendants were nationals of a different state and could have left the country, which was exactly what happened in contravention of the bail conditions.

However, having reviewed the Hill brothers' complaint, the UN Human Rights Committee assessed the lawfulness and justifiability of the detention and arrived at unequivocal conclusions.

The Committee affirmed its previous conclusion that pre-trial detention should be of exceptional nature and release on bail should be practiced unless there is a risk of the defendant absconding, tampering with the evidence, interfering with witnesses or leave the jurisdiction of the member State. However, the Committee indicated that, while the member State maintained the existence of valid grounds to assume that the defendants, should they be released on bail, would leave Spain, it nevertheless did not present any evidence confirming this assumption and explaining why this consequence could not have been prevented through setting a sufficiently high amount of bail or making the release contingent on another condition. The Committee stated that a mere assumption by a member State that the defendant may leave its jurisdiction if released on bail does not justify departure from the general rule of ICCPR Article 9(3).

The Committee thus ruled detention without proven impossibility of release on bail or another measure to secure appearance inconsistent with the ICCPR and noted that a mere assumption that the defendant would engage in prohibited conduct is not sufficient to impose detention.

3.2. Analysis of the implementation practice

According to the Prosecutor General's Office of the Republic of Kazakhstan, in 2009 19,510 motions to authorize detention were filed, 722 out of which were denied by the court. According to the Supreme Court, a total of 25,072 such motions were filed, 808 of which were denied.⁵³

The results of the monitoring undertaken as part of this project showed that in the vast majority of cases courts supported the prosecution and authorized pre-trial detention (in respect of 92.5% persons). Extension of pre-trial detention was authorized by courts in all monitored cases. In doing so, courts often ignored the arguments of the defence that sufficient grounds for a severe measure such as pre-trial detention did not exist, including the lack of reasonable suspicion necessary for a lawful apprehension.⁵⁴

These statistical data raise concerns and suggest that courts do not fully comply with the international standards described above. This approach is also conducive to unjustified restriction of the right to liberty and unreasonable growth of the prison population.

⁵³ Letter of the Head of Staff of the RoK Supreme Court No. 6-2-16/1337 of 9 April 2010; letter of the First Deputy of the Chair of the Legal Statistics and Special Accounts Committee of the Prosecutor General's Office No. 11к-4-1-1153 of 14 April 2010.

⁵⁴ See Chapter 3.4.5 below.

Table 1. Court rulings*

City	Court rulings							
	To authorize detention/ house arrest of the accused	To refuse the authorization of detention/ house arrest of the accused	To satisfy the motion to extend the detention of the accused	To refuse the motion to extend the detention of the accused	To change the measure of restraint (detention/ house arrest)	To apply a measure of restraint in the form of involuntary commitment in a psychiatric institution	To leave the ruling of the district or equivalent court without amendment	To return the case for additional inquest
Aktau	-	-	3	-	-	-	-	-
Aktobe	13	-	6	-	-	-	-	-
Almaty	28	5	8	-	1	-	1	-
Atyrau	17	1	1	-	-	-	1	-
Karaganda	13	3	9	-	-	-	-	-
Kokshetau	15	-	4	-	-	-	1	-
Kostanay	16	-	-	-	-	1	3	-
Pavlodar	10	-	12	-	-	-	-	-
Petropavlovsk	19	-	2	-	-	-	-	-
Taraz	7	3	-	-	-	-	-	2
Uralsk	32	5	-	-	-	-	2	-
Ust-Kamenogorsk	23	-	2	-	-	-	-	-
Shymkent	18	-	-	-	-	-	-	-
Total	211	17	47	0	1	1	8	2

* According to the number of accused/suspects.

3.3. Motioning the court to authorize pre-trial detention

The prosecutor's decision to support the investigator's motion for the authorization of pre-trial detention along with the substantiating materials must be submitted by the prosecutor to the court not later than 12 hours in advance of expiration of the detention term.⁵⁵

Since the monitors did not have the possibility of verifying the timeliness of the submission in all cases, the monitoring did not provide sufficient data on this issue. However, ten cases of submission of the materials after the deadline expiration were registered.⁵⁶

Only in one case the court refused to authorize the detention on the basis that the investigation failed to file the motion within the required time limits.

In the case of juvenile R., charged with the offence provided for by Article 179(2)(d) of CC, heard by the Almalinsky District Court of the city of Almaty on 15 March 2010, in the detention authorization hearing the prosecutor maintained that detention would be justified due to the gravity of the alleged offence, the risk of flight, and obstruction of justice. The prosecutor, however, did not provide any evidence in support of these claims. The defence lawyer claimed that the time limit for the submission of the materials to the court, stipulated by CCP Article 150(4), was not complied with. She also stated that the court would need to take into account that the juvenile had a permanent residence and parents, and requested that the juvenile be released on parental recognizance. The court ruled to refuse detention. In doing so, the court referred to the Supreme Court's Normative Ruling No. 1 of 10 June 2008 and noted that it had not been provided with evidence supporting the claim of the risk of flight or obstruction of justice.⁵⁷

With the exception of the above case, defence lawyers have not cited non-compliance with motioning time limits pursuant to CCP Article 150 as a reason to refuse the motion. The lawyers' passive attitude thus results in the violation of their clients' right to liberty.

According to the monitoring findings, in most cases where the time limits were not complied with the court did not pay attention to this circumstance. Terms of detention, as well as terms of judicial consideration of the authorization of detention are of key importance, since these are terms of restriction of a fundamental human right to liberty and must therefore be complied with unfailingly. To prevent unjustified extension of these terms, the judicial authorization case file must indicate the exact timing the motion is filed and be made accessible for the defence.⁵⁸ To achieve greater clarity in procedural sanctions, non-compliance with these terms should become a specific ground to refuse the authorization of detention.

3.4. Legislative conditions for applying pre-trial detention

The law draws a distinction between the **grounds for the application of a measure of restraint** (CCP Article 139) and **circumstances to be considered when selecting the measure of restraint** (CCP Article 141). This practice does not contradict the relevant international standards, as such. Most of the grounds provided for by CCP Article 139 are in line with, for example, those mentioned in Recommendation Rec(2006)13 of the Council of Europe Committee of Ministers. One notable exception is the ground "to

55 CCP Article 150(4).

56 AT-14-K-R, AT-18-K-R, KOS-7-K-R, AL2-10-K-R, AT-3-K-R, AT-4-K-R, AT-12-K-R, AT-19-K-R and other.

57 AL-2-5-K-R.

58 It should be noted that the Instruction of the Supreme Court President of 15 August 2008 No. 2-12-11/2633 provides for a requirement for the registrar of the motion to authorize detention/house arrest to indicate not only the date of submission, but also the exact timing. Cit. in Р.Н. Юрченко О СУДЕБНОМ САНКЦИОНИРОВАНИИ МЕР ПРЕСЕЧЕНИЯ (ПРАКТИЧЕСКОЕ ПОСОБИЕ) – Алматы: Жеті жарғы, 2009, p. 161.

ensure the execution of the sentence,” which clearly contradicts the presumption of innocence as it refers to the expectation of imprisonment. CCP Article 141 does not provide a full list of circumstances, since these are case-specific.

In the course of the monitoring, in addition to observation visits to detention authorization hearings, the experts conducted a study of the relevant case files. Their analysis indicates that criminal prosecution bodies often do not provide the court with evidence supporting the grounds to impose detention that would be sufficient in accordance with the relevant international standards.

The project statistical data (see Table 2 below) show that in justifying the need to detain, criminal prosecution bodies usually cite the risk of flight, or obstruction of justice, or else of committing further offences.

Table 2. Grounds for detention provided for by CCP Article 139 that were cited by criminal prosecution bodies⁵⁹

City	Grounds for detention provided for by CCP Article 139 that were cited by criminal prosecution bodies			
	Sufficient grounds to believe that the accused will abscond	Sufficient grounds to believe that the accused will obstruct the investigation and court proceedings	Sufficient grounds to believe that the accused will commit further offences	To ensure the execution of the sentence
Aktau	-	-	-	-
Aktobe	18	5	8	1
Almaty	19	8	8	2
Atyrau	10	7	8	
Karaganda	14t	10	1	-
Kokshetau	9	8	3	-
Kostanay	15	8	11	
Pavlodar	7	8	8	3
Petropavlovsk	14	7	12	-
Taraz	8	4	1	1
Uralsk	25	32	20	-
Ust-Kamenogorsk	14	4	8	
Shymkent	4	-	5	-
Total	157	101	93	7

As a rule, motions filed by the criminal prosecution bodies cite more than one ground for authorizing detention, as well as refer to circumstances provided for by CPC Article 141. However, supporting facts are rarely provided. Most often detention is justified by the gravity of the alleged offence. Frequent reference is also made to the personality of the defendant and his/her family and property status, as well as a lack of permanent residence (Table 3).

⁵⁹ According to the number of hearings where these grounds were cited.

Table 3. Circumstances concerning detention provided for by CCP Article 141 cited by criminal prosecution bodies*

City	Circumstances concerning detention								
	Gravity of the charges	Personality of the defendant, his/her family status, age, health condition, occupation, property status	Lack of permanent residence	Investigative activities and expertise not yet completed	Attempts to abscond	Identity not established	Detention authorization or conviction by a foreign State	Conditions of the previously imposed measure to secure appearance not complied with	The accused has been convicted and is currently serving a sentence in connection with another offence
Aktau	1	-	-	1	-	-	-	-	-
Aktobe	19	14	-	1	-	-	1	1	1
Almaty	20	8	12	6	1	5	1	-	-
Atyrau	11	3	3	-	-	-	1	-	-
Karaganda	12	6	2	6	-	-	-	-	-
Kokshetau	13	5	1	2	1	-	1	-	-
Kostanay	15	9	1	-	-	1	1	1	-
Pavlodar	9	3	1	9	-	-	-	-	-
Petropavlovsk	12	10	4	-	1	-	-	-	-
Taraz	1	2	1	-	1	-	-	-	-
Uralsk	35	16	8	-	2	-	-	1	-
Ust-Kamenogorsk	17	7	3	2	3	-	-	-	-
Shymkent	9	3	4	-	1	3	-	-	-
Total	174	86	40	29	10	9	5	3	1

* According to the number of hearings where these circumstances were cited.

Only in three court hearings observed by the monitors judges pointed out to the prosecutors that the motions to authorize detention were not sufficiently grounded.

In the case of B., charged under CC Article 369(2)(c), heard by Court No. 2 of the city of Taraz on 6 April 2010, the prosecutor argued the application to impose detention by the allegation that the accused committed a grave military offence punishable with up to ten years of imprisonment, and also cited the risks of committing further offences, obstructing the investigation, interfering with the victim, and fleeing from the investigation. When the judge asked how the accused might tamper with the investigation, the prosecutor answered: “There are no reasons, he may interfere with the victim.” The judge sought clarification whether the accused committed any violations in the course of the investigation, to which the prosecutor responded negatively. When the judge asked why B. had been detained, the prosecutor answered that he had committed a grave military offence. The judge refused to authorize detention.⁶⁰

In the case of T., charged under CC Article 307(4), heard by the Almalinsky District Court of the city of Almaty on 15 March 2010, at the detention authorization hearing the prosecutor argued for the imposition of detention by the gravity of the alleged offence and the risk of flight and obstruction of the investigation. The defence lawyers maintained that the prosecutor did not provide any supporting evidence. The defence noted that the accused was his family’s sole breadwinner, had a pregnant wife and three children, had a permanent residence and suffered from a gastric ulcer, which in detention was likely to worsen. The defence noted that the time limits specified by CCP Article 150(4) had not been complied with. The defence lawyer stated that his client’s father was ready to post bail. The judge ruled to refuse the authorization of detention, with a reference to the Supreme Court’s Normative Ruling No. 1 (Article 13). The court also reprimanded the prosecutor in connection with non-compliance with the time limit for filing the motion. After the ruling was announced, the detainee’s escort officers did not remove the defendant’s handcuffs, claiming that they needed to transport him back, hand him the ruling and allow him to collect his personal belongings. Five minutes later they told him: “You are suspected in a new crime,” and escorted him out of the courtroom handcuffed.⁶¹

3.4.1. Allegations of illegal conduct

As the monitoring showed, in the case of 34.8% of the accused the prosecution and investigation did not even try to prove the existence of grounds for detention. Sometimes the justification was made in two-three lines of the investigator’s decision and merely reproduced the provisions of the law.

For instance, in the case of I., remanded in custody on 18 September 2008 by a judge of the Petropavlovsk City Court, the investigator simply wrote “may abscond from investigation and trial” as a justification for seeking authorization for pre-trial detention. No evidence was cited to support this claim.⁶²

In the case of G., remanded in custody on 17 September 2008 by a judge of the Petropavlovsk City Court, the investigator cited as ground for detention that “the accused will abscond and obstruct justice.” No further information, documents or other materials supporting this claim were examined by the court. The issue of selecting an alternative measure of restraint was not discussed. However, detention authorization was granted. The court ruling stated that the prosecution’s arguments that the accused may abscond and obstruct justice were convincing and merited consideration, and no grounds for selecting a more lenient

60 TAR-8-K-R.

61 AL2-4-K-R.

62 Detention authorization file of the Petropavlovsk City Court No. 19, 12 January 2009.

measure of restraint were found.⁶³

3.4.2. Conflation of circumstances to be considered in selecting the measure of restraint and grounds for selecting pre-trial detention

As a rule, the motions do not draw any distinction between the grounds for detention and circumstances to be considered when selecting the measure of restraint. They are listed together. Thus, circumstances such as previous conviction record, lack of permanent employment, gravity of charges are *de facto* cited as separate grounds for imposing detention as a measure of restraint.

In the case of D., charged under Article 178(2)(a) CC, heard by Court No. 2 of the city of Aktobe on 9 April 2010, at the detention authorization hearing the prosecutor justified the application to detain the accused by the gravity of the charges, existence of a previous conviction record, lack of permanent employment and the risk of flight. The accused maintained that he had not made any attempt to abscond and unfailingly presented himself at the investigator's office every time after being interrogated as a suspect. He mentioned that he has a bedridden mother for whom he is the only family. He was also due to be hospitalized for TB treatment. The defence lawyer stated that the victim filed an application requesting to discontinue the case against the accused. Moreover, the accused should not be considered as having a conviction record, since all his convictions have been quashed and as such do not have legal consequences. The accused has not made any attempts at absconding after the interrogation as a suspect. The judge ruled to authorize detention.⁶⁴

In the case of S., charged under Article 259(1) CC, heard by the Court No. 2 of the city of Aktobe on 17 April 2010, at the detention authorization hearing the prosecutor's assistant justified the application for detention by the gravity of charges, temporary unemployment status of the accused, and risk of flight. These circumstances were not supported by evidence. The accused had no previous conviction record and had a permanent residence. The judge authorized detention.⁶⁵

3.4.3. Justification of pre-trial detention based solely on the gravity of the alleged offence

The monitoring findings demonstrate that in 13.8% of all cases the gravity of charges served as the sole argument for detention. The possibility that the accused may not be at all implicated in the crime and the ensuing risk of detaining an innocent person were not examined. It should be noted that the Supreme Court, in accordance with the body of international standards, has emphasized that the gravity of the alleged offence cannot serve as the sole and unconditional ground for selecting detention as a measure of restraint.⁶⁶ However, these standards, established by the court of highest instance, are not consistently complied with in practice.

In the case of M., charged under CC Article 259(2), heard by the Court No. 2 of the city of Taraz on 16 April 2010, the prosecutor argued the application for detention by the risk of flight, the gravity of charges and the risk of obstruction of the investigation. The defence lawyer explained that the accused lived with his elderly mother and had to maintain the household. The accused was disabled (2nd category disability) and suffered from TB and a number of other serious health conditions. He fully admitted his guilt. The

63 Detention authorization file of the Petropavlovsk City Court No. 17, 12 January 2009.

64 AK-6-K-R.

65 AK-18-K-R

66 Normative Ruling of the Supreme Court of the Republic of Kazakhstan No. 4 of 26 June 2010 on Judicial Protection of Human Rights and Freedoms in Criminal Proceedings, available at: <http://medialawca.org/document/-6430>.

lawyer found it questionable that in those circumstances the accused would abscond or obstruct the investigation. The judge asked the investigator, who was present at the hearing, how the accused could obstruct the investigation. The investigator responded that “the incriminated offence is a grave one.” The judge authorized detention based on the gravity of charges.⁶⁷

In the case of S., charged with the offence criminalized by CC Article 259(1-1), heard by the Auezovsky District Court of Almaty on 30 March 2010, at the detention authorization hearing the prosecutor justified the necessity of detention by the gravity of charges and sufficient grounds to assume a risk of flight. No evidence was presented to support the latter claim. The defence lawyer stated: “I request that the child’s birth certificate be included with the case file. At this point the accused does not have a conviction record. S. has a minor son and she does not pose a danger for society. It is quite likely that she would not be sentenced to imprisonment and put on probation.” The judge authorized detention based solely on the gravity of charges.⁶⁸

3.4.4. Application of alternative measures of restraint

The fact that alternative measures to secure appearance are resorted to very rarely raises concerns. Statistical data on detention authorization between 2008 and 2010 demonstrate that from August to December 2008, 5,970 instances of authorizing detention and 23 instances of authorizing house arrest (0.4%) were registered. In 2009, courts issued authorizations in a total of 19,510 cases. House arrest was imposed in 152 cases (0.8%). From January to March 2010 detention was imposed on a total of 3,899 persons. House arrest was authorized in respect of 54 accused/suspects (1.4%).⁶⁹

Despite the fact that the Supreme Court of Kazakhstan has expressly said that the court does not have an obligation, but a power to authorize detention as the most restrictive measure of restraint, and that motions for detention should only be satisfied provided there exist lawful grounds for doing so and a less restrictive measure would not be effective in meeting the objectives provided for by CCP Article 139⁷⁰, alternative measures of restraint are rarely imposed.⁷¹ The existing procedure leaves the choice of the measure of restraint at the investigator’s discretion, effectively depriving courts of the possibility to set boundaries for limitations of rights for the suspects and the accused. *De facto* courts agree or disagree with the decision made by the criminal prosecution body. Apparently due to the fact that bail and house arrest are more time-consuming and require more paperwork on the investigation’s part, investigators rarely

67 TAR-9-K-R

68 AL-3-2-K-R. Other examples: In the case of K., charged under CC Article 257(3), heard by the Kokshetau City Court on 21 April 2010, at the detention authorization hearing the prosecutor justified the necessity of detention by the gravity of charges. The prosecutor did not cite other grounds for detention. The defence lawyer noted that her client himself acknowledged his guilt. She also requested that the court consider the fact that the accused does not have a conviction record, has good references from his residence and has not made any attempts to abscond. The judge authorized detention (KOK-10-K-R); In the case of K., charged under CC Article 259(2)(2-1), heard by the Ust-Kamenogorsk City Court No. 2 on 28 April 2010, the judge authorized detention based solely on the gravity of charges. The judge did not consider the fact that the accused had permanent residence, was married with a young child, and his wife was on maternity leave, nor that the accused was his family’s sole breadwinner and had no previous conviction record. The investigation failed to support the claim that the accused posed a risk of flight (US-19-K-R).

69 Statistical data provided by the Legal Statistics and Special Accounts Committee of the Prosecutor General’s Office of the Republic of Kazakhstan (letter of the First Deputy of the Chair of the Legal Statistics and Special Accounts Committee of the Prosecutor General’s Office No. 11K-4-1-1153 of 14 April 2010).

70 Normative Ruling of the Supreme Court of the Republic of Kazakhstan No. 4 of 25 June 2010 on Judicial Protection of Human Rights and Freedoms in Criminal Proceedings, available at: <http://supcourt.kz/upload/iblock/693/4%20oeo.pdf>.

71 The Legal Policy Concept of the Republic of Kazakhstan for 2010-2020 sets as a top priority for the criminal procedure reform the creation of an enabling framework for the use of alternative measures of restraint. Available at: <http://www.minplan.kz/about/7931/24942/>.

apply them.

The prosecutor’s right to request house arrest to be imposed where the court refuses to authorize detention does not present a real alternative for the court, but appears to be rather a “face-saving” measure for the criminal prosecution bodies.

In accordance with CCP Article 150, a judge who refuses to authorize detention has the right to select **house arrest** as the measure of restraint **if motioned by the prosecutor** in the course of the hearing. The motion for house arrest may be filed by the prosecutor, if need be, immediately following the announcement by the judge of the ruling to refuse the authorization of detention in the event the prosecutor does not deem it necessary to appeal the ruling.

Table 4. Prosecutor’s motion for house arrest filed immediately following the announcement by the judge of the ruling to refuse the authorization of detention⁷²

City	Prosecutor’s motions for house arrest filed immediately following the announcement by the judge of the ruling to refuse the authorization of detention		Motions satisfied by the court	
	Filed	Not filed	Satisfied	Let without satisfaction
Almaty	-	5	-	-
Atyrau	-	1	-	-
Karaganda	2	-	-	2
Kostanay				
Taraz	-	3	-	-
Uralsk	1	4	1	-
Total	3	13	1	2

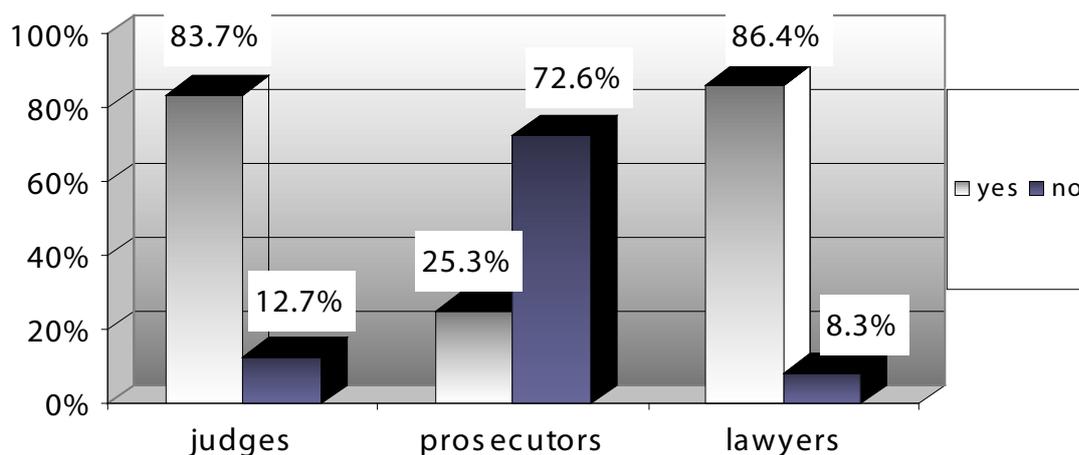
The monitoring findings show that prosecutors were not interested in applications for house arrest where the court refused to authorize detention. In 81.2% of the relevant cases prosecutors did not make such motions.

The results of a survey among legal practitioners demonstrate that the vast majority of judges and defence lawyers support vesting courts with the power of selecting the measure of restraint. One in four prosecutors polled also expressed support for this idea. It should be noted that in the criminal procedure of a number of OSCE participating States, including France, Germany and the United Kingdom, the judge exercises oversight over the protection of human rights and legality at the pre-trial stage, and is entitled to select the measure of restraint for the accused. For example, in Germany the court can choose an alternative measure of procedural restraint such as recognizance to appear before the judge, prosecutor, or police; recognizance not to leave the residence or a specified area without the judge’s permission; bail, and other.⁷³

⁷² According to the number of accused/suspects.

⁷³ See Н.П. Ковалев, ЗАКЛЮЧЕНИЕ ПОД СТРАЖУ ПО РЕШЕНИЮ СУДА В РЯДЕ ЕВРОПЕЙСКИХ СТРАН (ГЕРМАНИЯ, ИТАЛИЯ, АНГЛИЯ, ФРАНЦИЯ), available at: <http://www.consult.kz/index.php?uin=1178524359&chapter=1200910835>.

Chart 1. Poll results: Should judges be given the power to select the measure of restraint?



3.4.5. Ignoring the arguments of the defence

The project revealed repeated instances where the defence requested that detention not be imposed, referring to facts attesting in favour of the accused, such as permanent residence, employment, family and other circumstances for choosing a less restrictive measure of restraint. These arguments of the defence were often ignored in favour of unsupported stance of the prosecution. Court rulings often do not mention the arguments made by the defence, although the principles of equality of arms and adversarial proceedings require that the court treat both parties equally.⁷⁴

For example, in the aforementioned case of K., remanded in custody on 11 September 2008 by a judge of the Petropavlovsk City Court, the defence lawyer maintained that his client's guilt was not proven and requested that detention not be imposed since his client had a permanent residence and was a student. However, the court in its ruling ignored the arguments of the defence.⁷⁵

3.5. Detention terms

3.5.1. Initial detention terms

CCPR General Comment No. 8 requires that “[p]re-trial detention ... be an exception and as **short** as possible.”⁷⁶

Detention terms at the pre-trial stage must not exceed two months, with the exception of cases provided for by CCP.⁷⁷ Preliminary investigation bodies thus, as a rule, motion courts to authorize detention for a two-month term, and the courts in turn satisfy these motions in full. The law, however, allows the courts

⁷⁴ The analysis of case files shows that in over 75% of the examined cases the arguments of the defence were not considered in rulings to authorize detention. For example, in the case of K., remanded in custody on 31 August 2008 by a judge of the Petropavlovsk City Court, the accused asked not to be detained, referring to the fact that he has a young child who is due to start school, and has permanent residence. He also informed the court that he needed to undergo a medical check-up, since he has a disability (TB). He said that his sister and domestic partner were ready to sign a recognizance. The defence lawyer supported his client's stance, drawing the court's attention to the fact that the accused suffered from a serious illness. However, the court in its ruling ignored all arguments of the defence. (Detention authorization file of the Petropavlovsk City Court No. 1 of 12 January 2009).

⁷⁵ Detention authorization file of the Petropavlovsk City Court No. 10 of 12 January 2009. Similar facts found in the detention authorization files of the Petropavlovsk City Court No. 17, No. 12, and No. 22 of 12 January 2009.

⁷⁶ Available at: <http://www1.umn.edu/humanrts/russian/gencomm/Rhrcom8.html>

⁷⁷ CCP Article 153(1).

to decide on the term of detention within the two-month limit. The existing practice is presumably due to detention terms being viewed by courts as closely linked with investigation terms.⁷⁸

The monitoring found only a few cases where the initial detention terms granted were different from those motioned for by the criminal prosecution bodies. Thus, motions to detain three accused filed with the Uralsk City Court were granted and a one-month detention was imposed.⁷⁹ The Atyrau City Court granted an authorization to detain one accused for 15 days.⁸⁰ The same two courts granted authorizations to detain two accused for ten days, respectively.⁸¹ Overall, only in respect of 2.8% of the accused (from the total number of satisfied motions for detention) did courts authorize detention for a term below two months.

The detention of a suspect cannot exceed ten days from the moment of imposition of the measure of restraint, and if the suspect was arrested and then taken into custody - from the moment of arrest.⁸² The practice in such cases is hardly different from that concerning accused persons. In all hearings observed in the course of the project courts authorized detention for the maximum possible term of ten days.⁸³

Detention for the purpose of extradition can be authorized for up to one month.⁸⁴ In the two extraditional detention hearings observed courts granted authorizations for the maximum term.⁸⁵

3.5.2. Extension of detention terms

CCP Article 153 provides that where the investigation cannot be completed within two months and no grounds exist for modifying or cancelling the measure of restraint, the detention can be extended.⁸⁶ The CCP allows extending the detention in cases of especially high complexity or especially grave or exceptional charges. However, these circumstances should not substitute the grounds for detention provided for by the CCP (Article 139). In each case, the grounds for detention have to again be proven by the criminal prosecution body.⁸⁷

78 Preliminary investigation must be completed within two months from the initiation of the criminal case. CCP Article 96(1).

79 UR2-16-K-RUR2-10-K-R, UR2-9-K-R.

80 AT-2-K-R.

81 UR2-17-K-R, AT-14-K-R.

82 CCP Article 153(1).

83 AL-1-K-R, KOS-5-K-R, SHIM-4-K-R, SHIM-1-K-R.

84 CCP Article 534(5).

85 KOS-9-K-R, AL2-13-K-R.

86 If a substantiated motion is filed by the investigator and supported by the district/city prosecutor, an extension is granted by the district/equivalent court judge for a term up to three months. If a substantiated motion is filed by the investigator and supported by the regional prosecutor, an extension is granted by the district/equivalent court judge for a term up to six months (CCP Article 153(2)). An extension for a term exceeding six months may be granted by a district/equivalent court judge only in extremely complicated cases if motioned by the head of investigation department and supported by the regional/equivalent prosecutor, for a term of nine months (CCP Article 153(3)). An extension for a term exceeding nine months may be granted by a district/equivalent court judge only in exceptionally complicated cases involving allegations of commission of a grave or extremely grave crime, if motioned by the head of investigation department and supported by the regional/equivalent prosecutor, for a term of 12 months (CCP Article 153(4)). Detention extension for a term exceeding nine months must be initially discussed by the panel of regional/equivalent prosecutors (CCP Article 153(4)). Extraditional detention may be extended for two months, or for three months in exceptional cases (CCP Article 534 (6, 7)).

87 Moreover, the right to have the lawfulness of apprehension and pre-trial detention assessed concerns not only the initial detention authorization, but also subsequent periodic reviews, including in the course of the trial. See *Navarra v. France*, 23 November 1993, ECtHR Judgment, paragraph 26.

Table 5. Detention extension terms indicated in prosecutorial motions⁸⁸

City	Detention extension terms indicated in prosecutorial motions and granted by the court				
	Up to 2 months (extra-traditional detention)	Up to 3 months	Up to 4 months	Up to 5 months	Up to 6 months
Aktau	-	-	3	-	-
Aktobe	1	1	3	1	-
Almaty	-	8	-	-	-
Atyrau	1	-	-	-	-
Karaganda	-	7	-	-	2
Kokshetau	1	-	2	1	-
Pavlodar	-	12	-	-	-
Petropavlovsk	-	-	-	2	-
Ust-Kamenogorsk	-	2	-	-	-
Total	3	30	8	4	2

After considering a motion to extend the detention of a suspect, the prosecutor either expresses consent and immediately forwards the motion with the case materials supporting the reasonableness of extending the detention to the relevant court, or refuses support with a written reasoned explanation on the motion. If the prosecutor does not support the motion to extend the detention, the accused is entitled to immediate release on the expiry of the detention term.

A motion to extend the detention term for up to three months must be submitted to the court not later than seven days before the expiration of the detention term, and a motion to extend the detention term for over three months – not later than ten days before the expiration of the detention term.

A motion to extend the detention term is subject to review by a single judge. The prosecutor must participate in the hearing. Other participants may include the defence lawyer, legal representative of the accused, the victim and his/her legal representative or representative, however, their failure to attend does not prevent the review.

In the course of the project, observers visited 40 hearings on the extension of detention terms involving 47 accused. The observation findings raise doubts that the existing procedure works as an effective safeguard against arbitrary detention and ensures reasonable detention terms.

In particular, hearings on the extension of detention terms are often held in the absence of the accused (61.7% of all hearings observed).

88 According to the number of the accused/suspects.

Table 6. Participation of the accused in the hearing on the extension of the detention term⁸⁹

City	Participation of the accused in the hearing on the extension of the detention term	
	Present	Absent
Aktau	-	3
Aktobe	6	-
Almaty	-	8
Atyrau	-	1
Karaganda	-	9
Kokshetau	-	4
Pavlodar	12	-
Petropavlovsk	-	2
Ust-Kamenogorsk	-	2
Total	18 (38.3%)	29 (61.7%)

The monitoring findings show that the participation of the accused in hearings on the extension of detention terms does not follow a uniform practice. Whereas in Aktobe and Pavlodar 100% of all hearings were conducted in the presence of the accused, in the rest of the covered regions the accused were not brought before the court. Conducting such court hearings without the accused is at odds with the principles of adversarial proceedings and equality of arms, as well as with the right to defence, since the accused is stripped of the possibility to face the court, present evidence in his/her favour or objections to actions or decisions by the criminal prosecution body.

In the course of the hearing the prosecution and investigation often do not prove the continuing relevance of the grounds for the imposition of detention, but rather merely state the difficulties in conducting the investigation, such as inadequate time for obtaining expertise, the need to perform additional investigative actions, lack of response to the request sent to a foreign state, etc.⁹⁰ The main argument in favour of extending the detention continues to be the gravity of the charges.

In the case of A., charged under CC Articles 104(2) and 175(1), heard by the Court No. 2 of the city of Aktobe on 14 April 2010, at the hearing on the extension of the detention term the prosecution representative justified the necessity to extend the detention by the fact that A. had been charged with an intentional offence, the risk of flight and tampering with the witnesses, as well as the need to receive the results of an additional forensic examination and perform a number of investigative actions. No evidence was presented to prove the existence of these grounds. The defence lawyer requested that the court refuse the motion, since prior to detention her client had complied with the terms of the recognizance not to leave; he had a permanent residence, was married, and his son was now a dependent of his brother. Since the alleged offence was of medium gravity, the defence lawyer asked for house arrest. The judge accepted the motion to extend the detention term.⁹¹

⁸⁹ According to the number of the accused.

⁹⁰ PAV – 18 –K-R, PAV-15-K-R – PAV-9-K-R, PAV-4-K-R, PET-6-K-R, PET-5-K-R, KOK-20-K-R, KOK-9-K-R, KOK-4-K-R, KOK-3-K-R, US-10-K-R, US-7-K-R, AL2-18-K-R, AL2-14-K-R, AL2-12-K-R, AL2-8-K-R, AL2-1-K-R, AL3-1-K-R, AT-15-K-R, AT-13-K-R, KAR-14-K-R, KAR-13-K-R, KAR-7-K-R, KAR-5-K-R, KAR-2-K-R, KAR-1-K-R, AK-15-K-R – AK-12-K-R, AK-5-K-R, AK-4-K-R.

⁹¹ AK-13-K-R

In the case of G., charged under CC Articles 176(2)(b) and 325(2), heard by the Almalinsky District Court of the city of Almaty on 11 March 2010, at the hearing on the extension of the detention term the prosecutor's assistant justified the necessity to extend the term by the gravity of charges and the still unfinished investigation. Specifically, the graphological expert examination, and face-to-face confrontation of the accused and the victim remained to be performed. The defence lawyer declared that the reasons for extending detention were unclear and that the forensic psychiatric expert showed that the accused suffered from a mental disorder. The judge ruled to satisfy the motion to extend the detention term, based on the gravity of charges.⁹²

Non-completion of investigative actions and outstanding expert results and other technical problems of the investigation cannot serve as grounds for extending the detention term or for an unreasonably lengthy deprivation of freedom of the accused. Preliminary investigation bodies should, on the contrary, act more efficiently, so as to avoid unnecessary restriction of the right to liberty.⁹³ Courts, however, often take the side of the criminal prosecution bodies and ignore inefficiency, lack of evidence to support the extension of the term, and the possibility to apply a less restrictive measure of restraint.⁹⁴ In such situations courts do not exercise the function of judicial oversight, but rather serve the interests of the investigation bodies, facilitating their collection of evidence.

It should be borne in mind that in a democratic state governed by the rule of law human rights and freedoms are a supreme value, and the issue of extension of detention terms should be resolved with the interests of the individual in mind.

By the time the issue of extending the detention term is raised, the body conducting the criminal investigation should already have sufficient evidence to both assess the complicity of the person in question in the alleged crime, and select the most adequate measure of restraint. The court hearing should, to this end, review the reasonableness of further detention in detail.⁹⁵

Recommendations

1. Require criminal prosecution bodies to justify the selection of the measure of restraint before the court with references to specific evidence and appropriate reasoning.
2. Exclude reference to “the execution of the sentence” from Article 139 of the CCP as a ground for selection of the measure of restraint, as it is inconsistent with the presumption of innocence.
3. Establish legal and organizational frameworks for effective implementation of alternative measures of restraint, and vest the courts with the power to select measures of restraint.
4. Cease the practice of authorizing detention based solely on the gravity of the charges.
5. Require the courts to provide detailed reasoning for their decisions with respect to the arguments by both parties concerning the authorization of detention.
6. Amend the existing criminal procedural legislation by introducing provisions requiring full participation of the accused in court hearings on the extension of detention terms, and require

92 AL-2-1-K-R.

93 In this context, the jurisprudence of the European Court on Human Rights bears special relevance. In the case of *Wemhoff v. Germany* (ECtHR Judgment, 27 June 1968, para. 12-17) the court ruled that, as far as extending the detention term is concerned, the arguments of the prosecution must pass a stricter test than that which applies at initial detention.

94 This conclusion is supported by the statistics on the extension of detention terms. See Table No. 1 on p.29.

95 In this connection, the OSCE recommends that “the decision to detain or refuse bail ... be automatically reviewed regularly, at least every month. Such a decision should be subject to an appeal procedure.” Paragraph 3.3.10, Reference Guide to Criminal Procedure, OSCE Vienna, 2007. At p. 23. Available at: <http://polis.osce.org/library/f/3071/1897/OSCE-AUS-RPT-3071-RU-Справочное%20руководство%20по%20уголовному%20процессу.pdf>

criminal prosecution bodies to prove the necessity for the extension of detention and the absence of grounds for selecting a less restrictive measure of restraint.

7. When deciding on imposing or extending detention as a measure of restraint, courts should consider the individual circumstances of each accused, and determine the term of detention on a case-specific basis.
8. Courts should monitor that investigations are conducted without unreasonable delays. Inefficiency on the part of law enforcement bodies should not justify detention.

Chapter 4. Compliance of Kazakhstan's judicial procedure of authorizing pre-trial detention with international fair trial principles

4.1. Right to a public trial⁹⁶

In accordance with CCP Article 29(1) court hearings in all courts and at all levels shall be public. Exceptions may only be permitted where a case involves juvenile offenders, concerns a sexual offence, or otherwise interferes with the privacy of the participants, or where a public hearing would endanger the security of the participants or the protection of state secrets.

CCP Article 150 does not expressly provide for the public nature of hearings on the authorization of pre-trial detention. In the absence of specific rules, general provisions of CCP Article 29 on the public nature of criminal procedure should apply to these procedures, providing that such hearings shall be public. It should be noted that the Recommendations of the Criminal Chamber of the Supreme Court of the Republic of Kazakhstan expressly state that “[c]ourt hearings reviewing motions for detention shall be public. Closed-door sessions are only allowed on the basis of a substantiated ruling by the judge in cases provided for by CCP Article 29.”⁹⁷

4.1.1. Courtroom access

Unimpeded courtroom access for every interested person is a safeguard of the right to a public trial. The presence of the public in the courtroom is a form of civil oversight over the administration of justice. It also promotes the rule of law and legal culture of the population.

In practice, police officers and court bailiffs restrict access to courtrooms where hearings are held. Observers for this project have also been at times prevented from freely attending hearings on the authorization of pre-trial detention. For example, in Karaganda an observer encountered obstacles with attending hearings in all cases.⁹⁸ In Kostanay, in 14 out of 20 cases unimpeded courtroom access was not provided.⁹⁹

On 10 March 2010 at the Kokshetau City Court an observer asked the police officers on guard, court bailiffs, and the court clerk which detention authorization hearings had been scheduled. Court staff refused to provide the information, replying that such hearings were closed to the public. After the observer produced his ID, he was introduced to the head of the secretariat, who escorted him to the presiding judge, to whom the observer handed a copy of the letter of the Supreme Court detailing the project.¹⁰⁰ Only after this the observer was allowed unimpeded access to all detention authorization hearings.¹⁰¹

96 Art. 14 (1) ICCPR.

97 Cit. in Р.Н. Юрченко. О СУДЕБНОМ САНКЦИОНИРОВАНИИ МЕР ПРЕСЕЧЕНИЯ (ПРАКТИЧЕСКОЕ ПОСОБИЕ) – Алматы: Жеті жарғы, 2009, р. 161. The Supreme Court of the Russian Federation holds a similar view. The Plenary Decree of the Supreme Court of the Russian Federation No. 1 of March 5, 2004 states that “review of a motion for the imposition of detention on a suspect or accused as a measure of restraint, or for the extension of the detention term shall be conducted in a public hearing, with the exception of cases provided for by CCP Article 241(1).” Cit. in СТАНДАРТЫ ЕВРОПЕЙСКОГО СУДА ПО ПРАВАМ ЧЕЛОВЕКА И РОССИЙСКАЯ ПРАВОПРИМЕНИТЕЛЬНАЯ ПРАКТИКА. СБОРНИК АНАЛИТИЧЕСКИХ СТАТЕЙ. Под ред. М.Р. Воскобитовой. М., «Анахарсис», р. 208.

98 The observer attended 19 hearings.

99 In 44 out of 269 hearings the project observers faced obstacles with obtaining courtroom access. In these cases the observers were not allowed entry by the guards, asked to produce an ID or referred to court clerks or office specialists.

100 Letter of the Supreme Court of 29 January, 2010 No. 11-4/472.

101 КОК-1-N.

When visiting Court No. 2 of the city of Pavlodar on 26 March 2010, an observer found that access to the courtrooms was obstructed by three court bailiffs as well as a court staff member in civilian clothing. The observer's request to enter the courtroom was met with a rude refusal by the court staff member. He said that the observer had no right to be present at such hearings, and refused to identify himself.¹⁰²

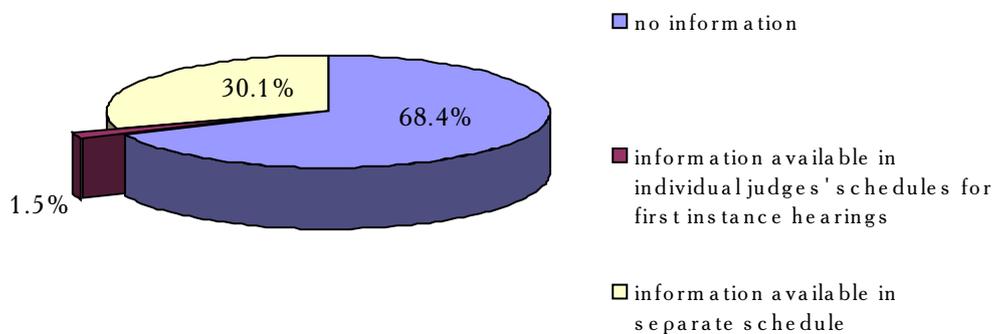
Lack of clarity in the law creates conditions for erroneous interpretation of the principle of a public trial as applied to the detention authorization procedure. The monitoring findings show that some judges arbitrarily interpret the law in its part concerning the public nature of detention authorization hearings, and consider the issue of access to courtrooms within their own or the presiding judges' exclusive competence. For instance, the presiding judge of the Almatinsky District Court No. 2 of the city of Astana stated in his letter to the project expert that he "allowed the observer an opportunity to be present at detention authorization hearings."¹⁰³

4.1.2. Availability of information on scheduled detention hearings

The practice of making information on detention authorization judges on duty publicly available in court facilities should be noted as positive. In 31.6% of all instances the observers found such schedules.

At the same time, no court provided a schedule of detention authorization hearings.¹⁰⁴ The observers had to obtain this information from a number of sources (mostly from court clerks or secretariats). In that respect, the judicial system does not provide sufficient conditions for informing the public about the hearing time and venue.

Chart 2. Public availability of information on detention authorization judges on duty



4.1.3. Court hearings in judges' offices

When detention authorization hearings are held in judges' offices the principle of a public hearing is objectively limited. In the course of the monitoring the observers attended 28 hearings held in judges' offices.¹⁰⁵ 18 of them were held in the office of the presiding judge of the Uralsk City Court No. 1.

Since these offices are not suited for court proceedings, holding detention hearings in crowded, insufficiently furnished spaces not equipped with the state insignia has a damaging effect on the formation of public respect for the judiciary. It may also create an adverse environment for participants in the proceedings.

102 PAV-1-K-R.

103 Letter of the presiding judge of the Almatinsky District Court No. 2 of the city of Astana of 28 April 2010. The same presiding judge refused to provide the project expert access to detention authorization files.

104 In 269 cases (100% of the hearings observed) the schedules of detention authorization hearings were not publicly available.

105 SHIM-11-K-R, SHIM-12-K-R, SHIM-15-K-R, AT-14-K-R, AT-15-K-R.

It would appear that these problems may be avoided through improving court administration, especially considering the current increase in funding for the judiciary.¹⁰⁶

Recommendations

1. Amend the law to include a provision for resolving detention authorization issues in a public hearing.
2. Make information on scheduled detention authorization hearings publicly available, including through posting on court websites.
3. Discontinue the practice of hearing cases in judges' offices.
4. Establish such access regimes to courts which, while guaranteeing the security and safety of judges and preventing interference with the administration of justice, would ensure that members of the public have an opportunity to be present in the courtroom in all cases permitted by the law.

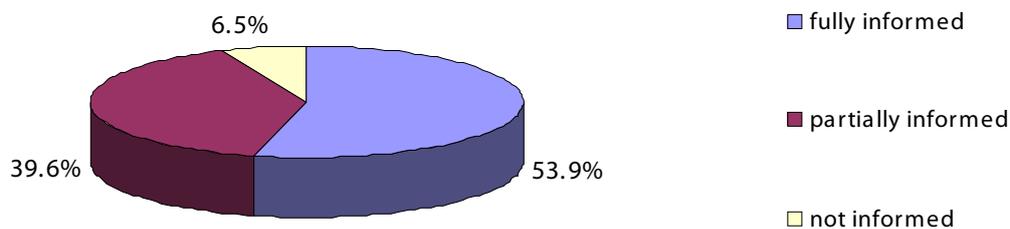
4.2. Right to be informed of one's rights¹⁰⁷

In accordance with CCP Article 26(2) the body conducting the criminal proceedings must inform the suspect or accused of their rights and enable them to defend themselves through all means not prohibited by law, and take measures to protect their personal and property rights.

The body conducting the criminal proceedings must inform each person participating in the proceedings of his/her rights and obligations, and to facilitate their exercise. At the request of the person concerned, the body conducting the criminal proceedings must repeat the explanation of the rights and obligations.¹⁰⁸

Full clarification of the rights within a simple and clear procedure creates a solid ground for the exercise of these rights. Informing of the rights means not only formally stating them, but explaining to the participants in the proceedings the substance of the legal options available to them and the relevant procedural rules.

Chart 3. Informing the accused/suspects of their rights

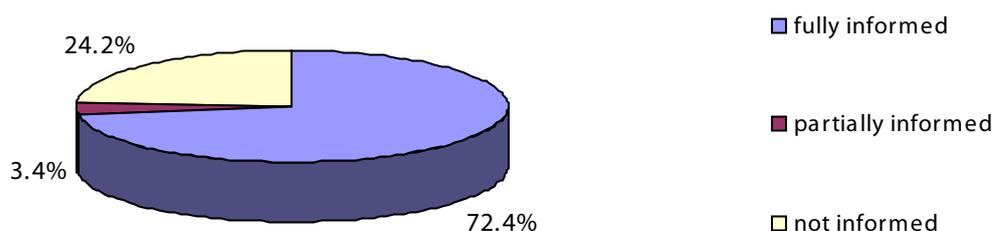


106 See e.g. Strategic Plan of the Supreme Court for 2009-2011, available at: http://online.prg.kz/Document/Default.aspx?doc_id=30827350.

107 ICCPR 9(2) and 14(3).

108 CCP 114(2).

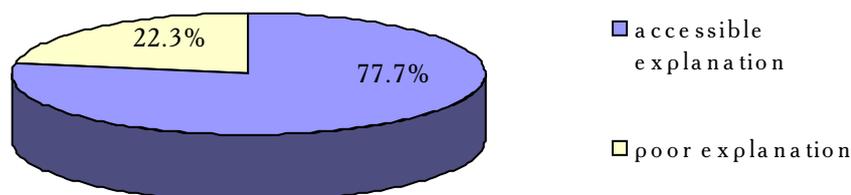
Chart 4. Informing the victim of his/her rights



The monitoring findings show that in most cases the judges fully explained the rights to the suspects/accused (53.9%) and victims (72.4%). The rights were partially explained to 39.6 % of the accused and 3.4 % of the victims. The rights were not explained to 6.5 % of the accused and 24.2 % of the victims.¹⁰⁹

At the same time the quality of the explanations was sometimes less than adequate. In some cases, the judge quickly read the relevant CCP article listing the rights. Sometimes the judges relied on their memory, which resulted in incomplete explanations.

Chart 5. Explanation of rights to the participants in the proceedings¹¹⁰



The law requires that the suspect/accused be immediately informed of his/her rights upon acquiring this status. At the same time, the CCP does not provide for the procedural form of the explanation of rights in a detention authorization hearing. Due to the special features of criminal procedure at this stage and the need to explain to the suspect/accused all legal options available with respect to the authorization of detention, it would be reasonable to provide in the law an exhaustive list of the rights of the accused in detention authorization hearings, and the procedure for informing him/her of these rights.

Recommendation

Provide in the law a specific list of rights of the suspect/accused during detention authorization hearings, and a procedure for explaining the rights. This procedure could be implemented in practice through, for example, an appropriate leaflet.

¹⁰⁹ In the case of D., charged under CC Article 311(4)(a, b), heard at Court No. 2 in the city of Taraz on 18 April 2010, at the detention authorization hearing the judge asked the accused: “Have you been informed of your rights?” The accused gave a positive answer, however, the observer was unable to ascertain who informed the accused of his rights and when. (TAR-10-K-R). In the case of B., charged under CC Article 178(1), heard at Yenbekshinsky District Court in the city of Shymkent on 29 March 2010, the judge did not inform the victim’s representatives of their rights (SHIM-4-K-R).

Only cases of full explanation of the rights are included. “Accessible explanation” means that the judge explained the rights clearly and without hurry, with due consideration of the ability of the participant in the proceedings to understand the information provided. “Poor explanation” means that the judge either quickly read the relevant CCP article or recited them from his/her memory. The observers have registered cases when the reaction of the accused showed lack of understanding of the rights (AK-1-K-R, AK-16-K-R, TAR-7-K-R).

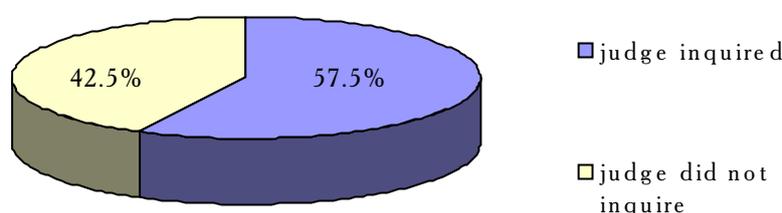
¹¹⁰ According to the number of suspects/accused present at the hearing.

4.3. Right to a translator

The administration of justice, implies effective participation in the proceedings, including in respect of detention authorization, of the person facing the liability. Such participation is only possible where the person in question understands what is happening in the courtroom and can defend him/herself in the language that he/she has command of. This is a fundamental principle of a fair trial.¹¹¹ Deciding on the lawfulness and justifiability of pre-trial detention without a translator in case the person in question does not have command of the language of the proceedings is unacceptable.

The monitoring findings show that in most cases (57.5%) the judge asked the suspect/accused whether he/she has command of the language in which the hearing will be conducted. However, in a substantial proportion of cases (42.5%) this question was not asked. This probably results from the fact that the law does not explicitly require judges to perform this action.

Chart 6. Inquiry by the court to ascertain whether the suspect/accused has a command of the language of the hearing



In the case of E., charged under CC Article 178(1), heard at Court No. 2 in the city of Kostanay on 17 March 2010, the accused was not proficient in the language of the proceedings (Russian), to which effect he made a statement in the courtroom. However, the judge did not ask the accused whether he needed a translator, and continued the proceedings in Russian. No translator was appointed. Since the accused was unable to understand what was happening, the judge asked him: “Have you completed at least nine grades of school?” The accused answered that he graduated from high school where the language of instruction was the state language. After that the judge started to ask questions in Kazakh. However, the ruling on the authorization of detention was pronounced in Russian, as a result of which the accused did not understand it. In the judge’s reception room the secretary asked the accused to sign an acknowledgement of receipt of the ruling. When the accused asked to explain him the contents of the document, the escort officers told him he was going to jail. The defence lawyer did not intervene to protect his client’s rights, but during the break said to the observer: “So much for human rights, he doesn’t understand, and the judge just carries on with the proceedings in Russian!” The lawyer, however, did not take any measures to defend his client’s rights, did not ask for a translator, and left before the ruling was pronounced.¹¹²

The problem of low-quality translation is systemic.¹¹³ Translation services in criminal proceedings require further improvement and development. Project observers noted the low level of skills and low quality of the services provided by the translators. Court staff members without relevant skills were often invited as translators.

In the case of S., charged under CC Article 175(2)(c), heard in Kazakh by the Almalinsky District Court

111 ICCPR Article 14 (3) f. See also *Harward v. Norway*, CCPR/C/51/D451/1991, 15 July 1994, paragraph 9.4.

112 KOS-7-K-R.

113 See РЕЗУЛЬТАТЫ МОНИТОРИНГА СУДЕБНЫХ РАЗБИРАТЕЛЬСТВ В РЕСПУБЛИКЕ КАЗАХСТАН. 2005-2006 ГГ. ОТЧЕТ, БДИПЧ ОБСЕ. АЛМАТЫ, 2007, p. 112.

of the city of Almaty on 8 February 2010, the judge asked the suspect whether he was proficient in the language of the proceedings. The suspect responded that his knowledge of Kazakh was poor. The judge announced a recess to allow time to invite a translator. A senior court specialist was invited as a translator. The hearing resumed. The invited person was not introduced to the parties nor informed of his rights, obligations and liability. His qualifications of a translator were not ascertained. The parties were not informed of their right to challenge the translator. In essence, the translator's function was reduced to asking the suspect in Kazakh whether he understood everything the participants said.¹¹⁴

In the case of Z., charged under CC Article 177(3), heard by the Al Farabiysky District Court of the city of Shymkent on 6 April 2010, a translator was invited at the request of the accused, however, the translator did not utter a single word in the course of the hearing.¹¹⁵

As of today, no court translation service exists in Kazakhstan. Core competencies for court translators have not been developed, there is no certification body in place, and the remuneration issue is unresolved. This makes relevant best practice from other OSCE participating States especially valuable. In many countries court translators are certified by the relevant structural units of judicial councils (e.g. in many U.S. states), by independent associations of sworn translators (Austria), or by the Ministry of Justice (Serbia). Translator contracting models also vary (staff court translators or freelancers).¹¹⁶

Recommendations

1. Regulate in the law guarantees of the right to quality translation. Courts must at all times ascertain whether the suspect/accused is proficient in the language of the proceedings or needs a translator. The translator and other participants in the proceedings must be informed of their rights and obligations with regard to translation.
2. In order to provide for adequate quality of judicial translation establish a court (sworn) translator service, and discontinue the practice of involving persons without the relevant education and skills as translators.

4.4. Right to defence and legal assistance

The right to defence implies the possibility for the accused or suspect to defend him/herself in person or through legal assistance of his/her own choosing.¹¹⁷

The principles of adversarial proceedings and equality of arms and the provisions on immediate and oral proceedings cannot be implemented without the participation of the accused and defence lawyer in the hearing. This means that every person whose right to liberty may be restricted must have the right to be present at the hearing and defend his/her rights and lawful interests.

In accordance with CCP Article 68(2), in the event the suspect is placed in custody or detained before the indictment, he/she must be interrogated within 24 hours from the moment of arrest or detention, and provided with the right to meet before the first interrogation one-on-one and confidentially with a

114 AL-1-K-R.

115 SHIM-6-KR.

116 See information materials of the Translators' Union of Russia at: <http://www.translators-union.ru/community/experience/legaltranslation>, <http://translation-blog.ru/sudebnyj#edit1>.

117 ICCPR 14 (3)(d), ECHR 6 (3)(c), paragraph 11.1 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

Table 7. Participation of the suspect/accused in the proceedings*

City	Participation of the suspect/accused in the hearing						
	Participated	Did not participate					
		Detention/ house arrest authorization hearing	Cancellation or modification of the measure of restraint (detention/house arrest)	Absentee detention	Extension of the detention/house arrest term	Appeal of the court authorization of detention/house arrest	Involuntary commitment in a psychiatric hospital
Aktau	-	-	-	-	3	-	-
Aktobe	20	-	-	-	-	-	-
Almaty	35	-	1	1	8	1	-
Atyrau	18	-	-	-	1	1	-
Karaganda	17	1	-	-	9	-	-
Kokshetau	15	-	-	-	4	1	-
Kostanay	16	-	-	-	-	3	1
Pavlodar	22	-	-	-	-	-	-
Petropavlovsk	18	1	-	-	2	-	-
Taraz	12	-	-	-	-	-	-
Uralsk	35	1	-	2	-	1	-
Ust- Kamenogorsk	17	-	-	5	2	-	-
Shymkent	18	-	-	-	-	-	-
Total	243 (83.2%)	3 (1%)	1 (0.3%)	8 (2.8%)	29 (10%)	7 (2.4%)	1 (0.3%)

* According to the number of suspects/accused.

lawyer of his/her own choosing or an appointed lawyer. In accordance with CCP Article 71, the defence lawyer must be involved if the case is reviewed with the prosecutor's participation. Since the CCP makes it mandatory for the prosecutor to participate in detention authorization hearings, such hearings may not be held without the defence lawyer's participation.¹¹⁸

4.4.1. Participation of the suspect/accused in the detention hearing

In the course of the project the observers paid attention to the participation of the suspect/accused in detention hearings.

As a rule, participation of the suspect/accused in detention authorization hearings was provided (86.2%). Observers saw only a few instances when these persons were not present at the hearing.

For example, in the case of R., charged under CC Article 158(1), heard by the Kokshetau City Court on 15 March 2010, a hearing on the extension of detention for the purpose of extradition was held without the accused. Before the hearing the judge repeatedly asked the prosecutor's assistant to bring the accused to the court, to which the assistant responded that there was no car available. The judge said: "Use yours if you need to, or I will issue a special ruling." The accused was not, however, delivered to the court and the judge authorized detention in his absence.¹¹⁹

In the case of P., charged under CC Article 179(2)(d), the authorization was in fact issued without a hearing. On 29 April 2010 at the criminal office of the Oktyabrsky District Court of the city of Karaganda an observer was told that the judge was to review a motion for detention. The accused at that point was in the court lobby with escort officers. The observer waited with them for the hearing to begin. At 17:15 a police officer approached the accused and told him: "There you go, your detention for two months was just authorized." The observer introduced himself to the officer, produced his ID and asked for clarifications. The officer said he was an investigator of the Oktyabrsky District police and that the hearing was over. Fifteen minutes later the court clerk entered the lobby and handed to the accused the ruling authorizing his detention. At the same time came the prosecutor, who also received his copy of the ruling. The observer ascertained whether the accused participated in the hearing. The accused responded that after being delivered to the court he stayed in the lobby with the escort officer and did not participate in any hearing. The defence lawyer on file did not show up to receive a copy of the ruling.¹²⁰

4.4.2. Participation of the defence lawyer in the detention hearing

The monitoring findings show that the bodies conducting criminal proceedings make an effort to ensure the defence lawyers' participation in detention authorization, extension and appeal hearings. Defence lawyers participated in 97.6% of all hearings observed.

However, the existing procedure of the defence lawyer's participation in the detention authorization hearing, as provided for by CCP Article 150, does not fully safeguard the right to defence and legal assistance. Thus, in accordance with CCP Article 150(6) a failure by the suspect/accused and his/her defence lawyer to attend does not impede proceeding with the hearing, if the said persons were duly informed of the time and venue of the hearing. However, in practice the suspects/accused and their lawyers are often not duly

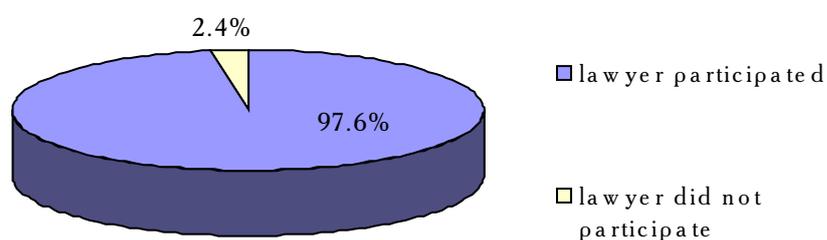
118 CCP Article 150(9).

119 KOK-4-K-R.

120 KAR-19-K-R.

informed.¹²¹ The legal possibility to authorize detention in the defence lawyer's absence may interfere with the fundamental right to defend oneself through legal assistance.

Chart 7. Participation of defence lawyers in detention hearings



In the course of the project the observers also paid attention to the procedure of implementation of the right to defence. One of the monitored issues was the legal basis for the lawyers' participation in the hearings.

Table 8. Legal basis for the lawyers' participation in the hearings¹²²

City	Appointed	Invited	Not clear	No legal basis
Aktau	-	3	-	-
Aktobe	13	6	1	-
Almaty	24	12	10	-
Atyrau	16	3	1	-
Karaganda	13	10	2	-
Kokshetau	12	7	1	-
Kostanay	19	1	-	-
Pavlodar	13	8	1	-
Petropavlovsk	13	8	-	-
Taraz	10	1	-	-
Uralsk	24	16	-	-
Ust-Kamenogorsk	15	5	-	3
Shymkent	13	4	1	-
Total	185	84	18	3

As the practice shows, in most cases the defence lawyer was appointed by the body conducting the criminal proceedings. In a number of cases the procedure for appointing defence lawyers was not complied with, and the right to defence was marred by abuse.

In the case of O., charged under CC Article 175(2)(a, b, c), heard by the Court No. 2 of the city of Ust-Kamenogorsk on 5 April 2010, an absentee detention hearing was attended by a defence lawyer. When asked by the observer whether she was invited by the accused or appointed, the defence lawyer answered that she had just been asked by the judge to participate in the hearing, she had never met the accused and happened to be in the courthouse in connection with a different criminal case. The defence lawyer did

¹²¹ See Chapter 4.7.1 below.

¹²² According to the number of suspects/accused. The total number of lawyers does not coincide with the total number of suspects/accused, since in two cases each suspect/accused was represented by two defence lawyers.

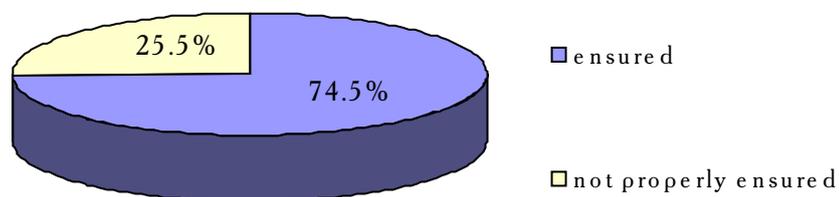
not know anything about the accused and supported the prosecutor's motion for detention, justifying it by the fact that the accused was wanted by the police. The lawyer left the courtroom before the ruling was pronounced.¹²³

The practice of involving defence lawyers without complying with the formal procedure of defender appointment pursuant to CCP Article 71 spawns human rights violations of the persons facing criminal liability and also fosters corruption in the bar, law enforcement bodies, and the judiciary.

4.4.3. Extent of implementation of the right to legal assistance

The right to legal assistance is a fundamental principle of criminal justice. The degree to which this right is met is one of the assessment criteria of the compliance of judicial authorization of detention with the relevant international fair trial standards.

Chart 8. Ensuring the right to legal assistance



Project observers were requested to evaluate the defence lawyers' performance using the following criteria: clear position in the case and effective strategy, knowledge of the case and legislation, skill in defending his/her position in the proceedings. In most cases (74.5%) the observers evaluated the services provided as skilful, competent and effective.

The monitoring showed that in some cases the right to defence was not duly met. Low quality legal assistance was more often provided by the lawyers appointed by the bodies conducting the criminal proceedings. In some cases one lawyer represented several accused at the same time.¹²⁴

In the cases of H. and K., charged under CC Article 178(2)(a, b), at the detention authorization hearings conducted on 31 March 2010 by the Court No. 2 of Taraz the defence lawyers' participation was perfunctory, their statements brief and poorly reasoned. When delivering a statement with respect to K., the lawyer said he was leaving the [detention] issue "at the discretion of the court," prompting an exclamation from the bench: "What do you mean, 'at the discretion of the court'?"¹²⁵

In the case of L., remanded in custody by the Petropavlovsk City Court on 17 September 2008, after the prosecutor, who supported the investigator's motion for detention, the defence lawyer said: "Considering the grounds for my client's detention, and the fact that he has a conviction record, I support the investigator's motion."¹²⁶

123 US-1-K-R. Similar story with the defence lawyer in US-9-K-R.

124 TAR-2-K-R, SHIM-13-K-R, US-4-K-R, AK-9-K-R, AK-10-K-R. The law prohibits such representation only in the case of a conflict of interest, however, a future conflict of interest cannot be ruled out, while simultaneous representation of several accused adversely impacts on the completeness and quality of the legal assistance provided.

125 TAR-5-K-R, TAR-6-K-R

126 Detention authorization file of the Petropavlovsk City Court No. 16 of 12 January 2009. Low quality legal aid was provided at hearings in Shymkent (SHIM-2-K-R), Pavlodar (PAV-12-K-R), Ust-Kamenogorsk (US-14-K-R), Uralsk (UR-1-K-R), Petropavlovsk (detention authorization files of the Petropavlovsk City Court No. 7 and No. 14 of 12 January 2009)

Some appointed defence lawyers apparently lack the motivation to fully exercise the opportunities available to them according to the law to defend their clients' interests.¹²⁷ The problem of quality of the legal representation is systemic and needs to be addressed in a comprehensive manner through raising the status of the legal profession, strengthening guarantees of the independence of lawyers, developing self-governance in the legal profession, and improving compliance with ethical codes through more rigorous control by the bar.

Recommendation

Review the practicability of introducing a requirement to inform the accused in writing of his/her right to receive legal assistance of his/her own choosing and of the relevant steps made by the accused in a separate protocol in advance of the detention authorization hearing.

4.5. Right to a fair and impartial hearing

In the course of the project the observers paid attention to the extent to which the **provisions of the law concerning the right to a fair and impartial hearing** were met by the judges. The observers found that judges do not, as a rule, show unfairness or partiality in the course of hearings, and observe the ethical rules.

In some cases, however, the judges' conduct raised doubts as to their commitment to the noted principles of criminal proceedings.

For example, in the case of D., charged under CC Article 259(1-1), reviewed by the Court No. 2 of the city of Kostanay on 14 March 2010, the judge remarked that the accused looked familiar to her and asked whether he appeared as a witness in a recent drug dealing case. The accused gave a positive answer. The judge then said that because of the accused a woman was sentenced to six years in prison. The judge then asked why the accused had been arrested, and added with irony: "Didn't you work well for the police? It's probably a good thing they arrested you, you'd be better off in jail. Why didn't you negotiate a deal with your employers?" She noted that the case file mentioned two different packets of heroin and added: "So what do you say, D.? The police really wanted to arrest you anyway, just in case you didn't have a pack on you they tossed one in to be sure, right? But one of them is surely yours, isn't it?"¹²⁸

In at least one case the court prejudged the issue of the accused person's guilt before the completion of the investigation and the actual trial.

In the case of R., charged under CC Article 178(2)(a, c), heard by the Uralsk City Court No. 1 on 16 March 2010, the court ruling on authorizing the detention states that "... [T]he court proceeds from the fact that the accused committed a crime categorized as grave in accordance with CC Article 10..."¹²⁹

It should be noted that isolated instances of biased, unethical, and inappropriate conduct by individual judges cast a shadow on the judiciary as a whole.

The monitoring findings revealed cases when **the authorization of detention of several suspects/accused was decided in the same hearing**. For example, on four occasions the court simultaneously heard motions

127 A similar conclusion is made in the report of the Astana branch of the Kazakhstani Bureau for Human Rights and Rule of Law. See САНКЦИОНИРОВАНИЕ АРЕСТА СУДОМ. ДОКЛАД ПО РЕЗУЛЬТАТАМ МОНИТОРИНГА, ПРОВЕДЕННОГО В СУДАХ Г.Г. АКТАУ, АЛМАТЫ, АСТАНА, КОСТАНАЙ, УСТЬ-КАМЕНОГОРСК И ПАВЛОДАР. Astana, 2010, pp. 39-40.

128 KOS-3-K-R.

129 UR-3-K-R.

in respect of three accused; on eleven occasions the court simultaneously heard motions in respect of two accused. In this connection certain doubts may be expressed with regard to the stance of the Criminal Chamber of the Supreme Court, reflected in its Recommendations, that detention authorization motions in respect of more than one accused may be heard in the same proceeding if the respective criminal cases are joined by the criminal prosecution body.¹³⁰ The issue of detention is of fundamental importance in criminal justice and requires an individual approach. Every person whose detention is decided should be entitled to the full spectrum of legal options available under the law and should be exempt from the restrictions inherent in a collective review of the case. Moreover, in some cases the presence in the courtroom of accomplices, their defence lawyers and family members prevents some accused from fully expressing their views on detention and presenting exonerating evidence.

Recommendation

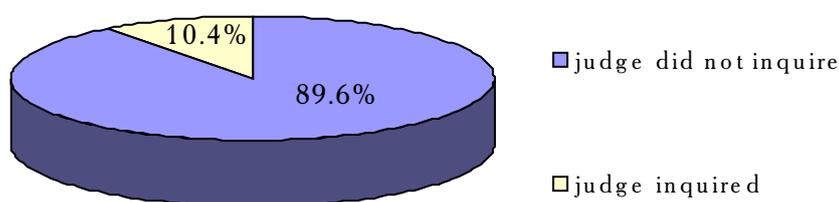
Each arrested person’s case should be reviewed in a separate hearing and the practice of group hearings on detention authorization in respect of more than one accused should be abandoned.

4.6. Ascertainment of the lawfulness of investigative techniques

Torture, cruel and inhuman treatment and punishment do not have a place in the criminal justice system of a democratic state governed by the rule of law. Article 2(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”¹³¹ Torture is prohibited by ICCPR Article 7 as well as a number of OSCE commitments.¹³²

As noted in Chapter 1 of this report, the *habeas corpus* mechanism is a key part of judicial oversight over compliance with relevant laws, since the power to give a final judgment on actions by the law enforcement and to protect human rights and freedoms in criminal proceedings from unjustified interference rests with the judiciary.

Chart 9. Inquiry by the judge whether the suspect/accused was subjected to unlawful investigative techniques¹³³



The Normative Ruling of the Supreme Court “On application of norms of criminal and criminal-procedural

130 See Recommendations of the Criminal Chamber of the Supreme Court of the Republic of Kazakhstan. Cit. in P.H. Юрченко. О СУДЕБНОМ САНКЦИОНИРОВАНИИ МЕР ПРЕСЕЧЕНИЯ (ПРАКТИЧЕСКОЕ ПОСОБИЕ), Алматы: Жеті жарғы, 2009, p. 161.

131 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at: <http://www.un.org/russian/document/convents/torture.htm>. The Convention was ratified by the Law on the Republic of Kazakhstan No. 241-1 of 29 June 1998.

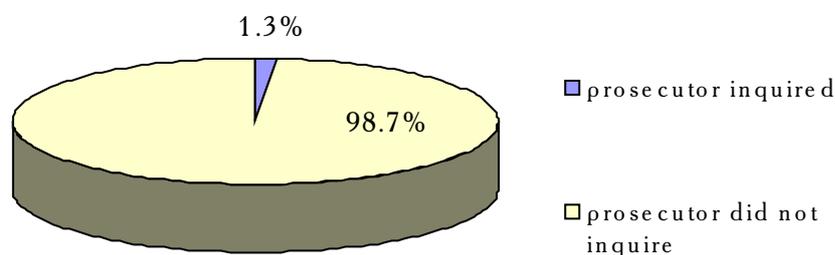
132 Paragraph 23.4 of the 1989 Vienna Document, paragraph 16.1 of the 1990 Copenhagen Document, paragraph 21 of the 1999 Istanbul Summit Declaration, and other.

133 According to the number of suspects/accused present at hearings.

law on the issues of protecting personal freedom and inviolability of human dignity, combating torture, violence, and other cruel, inhuman or degrading treatment or punishment” establishes the following procedure for verifying allegations of torture and the exclusion of the evidence elicited through such means. If a complaint about the use of torture, violence, or other cruel, inhuman or degrading treatment is made during the hearing, the court must take all legislatively prescribed steps to hear it immediately. If the full review of the complaint necessitates taking measures outside the court’s competence (pre-investigative examination, initiation of a criminal case, conduct of inquest or investigation, etc), the court shall issue a resolution tasking the prosecutor to carry out an appropriate verification, indicating the deadline for submission of results to the court. Materials from the verification of the complaint and the procedural decisions undertaken are pronounced in a court hearing and attached to the case file. When ruling on the parties’ motions to exclude evidence obtained through torture or other unlawful actions, courts should proceed from the premise that the prosecutor carries the burden to prove that the evidence on file had been obtained lawfully.¹³⁴

In accordance with paragraph 20 of the Guidelines “On the verification of complaints concerning torture and other unlawful and cruel treatment of persons involved in criminal proceedings or placed in special institutions, and their prevention”, during the court hearing on authorizing or extending detention the prosecutor must inquire whether the suspect/accused had been subjected to unlawful investigative techniques, and motion the court to include the questions and the answers in the minutes of the hearing.¹³⁵ The observers paid attention whether the provision in question was complied with in the course of detention authorization hearings.

Chart 10. Inquiry by the prosecutor whether the suspect/accused was subjected to unlawful investigative techniques¹³⁶



The monitoring findings show that, as a rule, neither prosecutors nor judges question the suspect/accused to ascertain whether the latter was subjected to torture or other unlawful coercive methods.¹³⁷ Such conduct on the part of prosecutors obviously contravenes paragraph 20 of the above Instruction. Passivity of the judges in torture prevention is at odds with the goals and objectives of judicial oversight and casts a negative light on the judiciary’s capacity to protect human rights.

In the case of V., charged under CC Article 96(1), heard by the Uralsk City Court No. 1 on 1 April 2010, the detainee informed the court that in the police cell he was often visited by police officers who asked him to confess in other crimes (thefts), since a murder sentence would absorb theft sentence terms anyway. The accused complained that the officers put him under psychological duress. He claimed that before he wrote

134 Normative Ruling of the Supreme Court of 28 December 2009, Paragraphs 12-14, available at: <http://www.medialawca.org/files/190110law.pdf>.

135 Adopted by the Order of the Prosecutor General No. 7 of 1 February 2010, available at: http://lex.kz/netcat_files/160/82/h_ce5e406db9233fde685e651762a6a0df.

136 According to the number of suspects/accused present at hearings.

137 Only 25 accused out of 240 were questioned by the court concerning the use of torture or other unlawful investigative methods. Prosecutors tried to ascertain this information only in three cases.

the confession he had been hit twice and threatened with rape. The defence lawyer was allowed to meet with him only after he made a confession. The prosecutor did not show any reaction to these words. The judge did not make any attempts to verify this information.¹³⁸

In the case of P., charged under CC Article 259(2), heard by the Court No. 2 of the city of Ust-Kamenogorsk on 28 April 2010, the accused stated: “I request that the motion for detention be refused, since I had been threatened, I testified under duress, they were trying to extort money, put a plastic bag on my head, and I incriminated myself.” The presiding judge asked for clarifications concerning the specific acts committed by the law enforcement officers, then asked why the accused did not complain to the prosecutor. However, no further attempts were made to verify the statements of the accused. The prosecutor did not react to the complaints in any way.¹³⁹

Recommendation

Provide in the CCP and ensure practical implementation of the court’s obligation not only to question the suspect/accused about the violations of their rights, but also effectively verify these facts in all cases. In accordance with best practices based on international human rights instruments,¹⁴⁰ in examining complaints concerning torture and cruel treatment the burden of proof that the allegations are groundless should rest with the law enforcement bodies.

4.7. Other issues concerning the procedural aspects of authorizing pre-trial detention

Compliance with due criminal procedure is a guarantee of fair trial that respects the participants’ human rights. The monitoring showed that judges fully comply with the procedure as long as it is expressly regulated by the law on detention authorization. For example, CCP Article 150(9) requires that the court announce the motion to be heard. The absolute majority of judges comply with this provision. Only in seven out of 269 hearings did the judge not make an announcement of the motion for the authorization/extension of detention. Only in one out of seven hearings reviewing appeals on court rulings authorizing detention the judge did not announce whose appeal was to be heard.

However, not all elements of the detention authorization procedure are clearly provided for by the legislation, which gives rise to problems in practice. For example, the law does not describe the sequence of actions by the hearing participants, their powers are not spelled out in detail, and the order of interaction between the judge and the parties in the courtroom is not prescribed. In these circumstances judges often proceed by analogy with trial, but this practice is not universal. Lack of express provisions in the law results in contradictory practice and may adversely affect the rights of the hearing participants.

In the course of the project the observers paid attention to the following important fair trial guarantees that are not expressly addressed by the CCP.

138 UR-17-K-R.

139 US-20-K-R.

140 In accordance with the jurisprudence of the European Court of Human Rights, the burden of proof lies with the prosecution. The Court holds the following stance: “Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.” (*Salman v Turkey*, Application No. 21986/93, 27 June 2000, para 100, <http://www.unhcr.org/refworld/docid/3ae6b6c30.html>).

4.7.1. Proper notification of the court hearing time and venue

Since participants in criminal proceedings are entitled by law to exercise their rights in a detention authorization hearing, courts must address the issue of **proper notification of the said persons of the hearing time and venue** and of ascertaining the reasons for their failure to appear.

Table 9. Ascertaining the reasons for failure to appear

City	Ascertaining the reasons for the hearing participant's failure to appear		Confirmation of proper notification of the absent participant		Public announcement of documents justifying the necessity to authorize absentee detention*	
	Ascertained	Not ascertained	Confirmed	Not confirmed	Announced	Not announced
	Number of hearings					
Aktau	-	1	-	1	-	-
Aktobe	4	4	2	6	-	-
Almaty	5	24	3	26	-	1
Atyrau	1	12	-	13	-	-
Karaganda	8	8	4	12	-	-
Kokshetau	5	11	2	14	-	-
Kostanay	7	7	4	10	-	-
Pavlodar	1	-	1	-	-	-
Petropavlovsk	1	7	-	7	1	-
Taraz	2	-	2	-	-	-
Uralsk	2	22	-	22	2	-
Ust-Kamenogorsk	5	9	6	8	3	-
Shymkent	4	3	1	6	-	-
Total	45	120	25	125	6	1

* Documents confirming the fact of absconding, absence in the territory of Kazakhstan or failure to appear despite proper notification of the hearing time and venue.

The observers paid attention whether the court clerk announced the reasons for the participant's failure to appear and whether the participant in question had been duly notified. Possibly due to the lack of an express requirement in the law to perform these actions, courts in most cases did not properly address the issues of notification and ascertaining the reasons for the failure to appear.¹⁴¹ As the result, interested persons may be deprived of a possibility to exercise their rights in court.

In the case of R., charged under Articles 167(3) and 209 of the Criminal Code of the Republic of Uzbekistan, heard in Atyrau city court No. 2 on 20 April 2010, the hearing on the extension of an extraditional detention term was not attended by either the accused or her defence lawyer. The reasons for their failure to appear were not scertained nor was it established whether they had been properly

¹⁴¹ See Table 9. AK-4-K-R, AK-14-K-R, AK-16-K-R, AL-1-K-R, AL-4-K-R, SHIM-2-K-R, AT-7-K-R, AT-10-K-R, KOS-4-K-R, KOS-17-K-R, KOS-20-K-R, AL2-1-K-R, AL2-2-K-R, AL3-1-K-R, AL3-3-K-R, AL3-4-K-R, AL3-5-K-R, AT-13-K-R.

notified.¹⁴²

The principles of adversariality and equality of arms, the right to defence and other fair trial guarantees may only be implemented if the court oversees the implementation of the right of the participants in the proceedings to participate in detention authorization hearings.

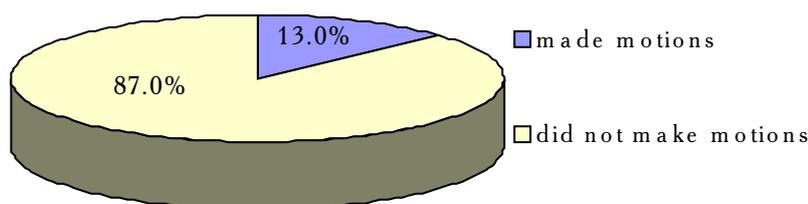
Recommendation

Amend the law to include effective procedural safeguards of due notification of interested participants in the proceedings of the time and venue of the hearing on detention authorization.

4.7.2. Participation in the hearing

The right to motion is guaranteed by the criminal procedural legislation.¹⁴³ This right allows participants in the proceedings to express their arguments, and as such safeguards fairness of the proceedings. Since the law does not expressly provide for the possibility for participants in the proceedings to file motions in the course of the detention hearing, only a few of them exercise this right.

Chart 11. Motions made by the parties



Only in 35 out of 269 were hearings motions filed. The existing situation does not facilitate a comprehensive and complete examination of detention issues. The parties should be encouraged to exercise this right in practice.

The possibility for participants in the proceedings to express their views on the motion for the authorization of detention and to substantiate them pursuant to the procedure provided for by law is the procedural mechanism ensuring the exercise of the right to defence.¹⁴⁴ Impartial and objective administration of justice implies creating enabling conditions for the exercise of this right. The monitoring findings demonstrate that the requirements of the law concerning **hearing views of participants in the detention proceedings** are generally complied with. Only in one case out of 240 was the accused not given an opportunity to be heard. The views of defence lawyers are also normally heard. Only in five out of 274 cases did the court refuse to hear the defence's views on the motion for detention.

At the same time, **participation of the investigator in the capacity of a prosecutor's substitute** raises certain doubts. In some cases the justifications for selecting detention as the measure of restraint were provided by investigators, while the prosecutor's participation in the hearing was a mere formality.¹⁴⁵

In the case of Z., charged under CC Article 179(2)(a, d), heard by the Al Farabiysky District Court of the city of Shymkent on 5 April 2010, the prosecutor did not provide a justification of the necessity to detain the accused. He only stated that he supported the investigator's motion. The judge received the remaining

142 AT-15-K-R, similar violations in reports KAR-1-K-R, UR-18-K-R.

143 CCP Article 68, 69, 74, 75, 77 – 81.

144 CCP Article 150(9).

145 AL-4-K-R, SHIM-6-K-R

information from the investigator, who justified the detention by the gravity of charges and the risk of flight, since two accomplices of the accused were absconding. The judge authorized detention.¹⁴⁶

In order to ensure proper implementation by participants in the proceedings of their procedural functions, the powers of the criminal prosecution bodies in detention authorization hearings should be clearly delineated. It is the prosecutor's role to represent the State in court, since the prosecutor is the official supporting the prosecution and tasked with making key procedural decisions at the pre-trial stage.¹⁴⁷ Representatives of the investigation body cannot and should not substitute the prosecutor in court.

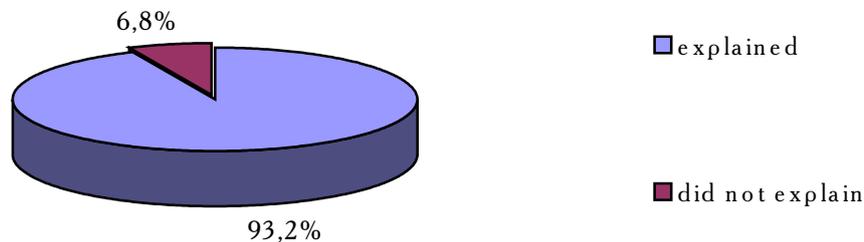
Recommendations

1. Regulate the procedure of presenting evidence at detention authorization hearings to ensure comprehensive and complete examination of the grounds for restricting the right to liberty, and to safeguard equality of arms and adversariality of the proceedings.
2. The powers of the criminal prosecution bodies in detention authorization hearings should be clearly delineated. The prosecutor should represent the State in court, as the official responsible for the prosecution and tasked with making key procedural decisions at the pre-trial stage.

4.7.3. Right to appeal

The right to appeal decisions by bodies conducting the criminal proceedings is a mechanism for remedying potential human rights violations. Effective exercise of this right is possible if interested parties are duly informed about it.

Chart 12. Court explained the terms and procedure for the appeal of its decision/ruling



The extant criminal procedure legislation does not expressly require that the court inform participants in the proceedings of the terms and procedure of appeal of detention authorization rulings. However, in the vast majority of cases judges did provide this information. Only in 6.8% of all cases did judges not inform the parties of this right and the procedure for exercising it.¹⁴⁸

Recommendation

1. Consider amending the law to include an express requirement for the court to provide detailed information to participants in the detention proceedings of the terms and procedure of appeal of the relevant court ruling.

146 SHIM-5-K-R. A similar situation was observed in Almaty (AL2-2-K-R).

147 For instance, in common law countries (Canada, United Kingdom, United States) it is the prosecutor who must provide justifications for detention to the judge in the course of the hearing. In France, Germany and Italy only the prosecutor's motion presents a valid ground for the court to consider the issue of authorizing detention. See Н.П. КОВАЛЕВ, РОЛЬ ПРОКУРОРА В УГОЛОВНОМ ПРОЦЕССЕ НА ЭТАПЕ АРЕСТА И ЗАКЛЮЧЕНИЯ ПОД СТРАЖУ ПОДОЗРЕВАЕМОГО (ОБВИНЯЕМОГО). Available at: http://www.zakon.kz/engine/print.php?page=1&newsid=101189&show_comm=1.

148 АК-1-K-R, АК-2-K-R, AL2-2-K-R and other.

4.7.4. Physical restraints on personal liberty

Inviolability of person implies respect for **physical liberty** of the person subjected to measures of procedural restraint. Moreover, the presumption of innocence implies impermissibility of resorting to disproportionately severe measures of physical restraint in respect of the suspect/accused.

Table 10. Physical restraint imposed on persons in question

City	Use of restraining devices (handcuffs, etc.) in respect of the person in question*				Placement of the suspect/accused in the courtroom*		
	Handcuffed	Chained to the detainee escort officer	Handcuffed when inside the defendant's box	No restraining devices applied	Inside the defendant's box	At the table next to the defence lawyer	At the visitor bench/separate table
Aktobe	-	-	-	20	4	15	1
Almaty	1	22	1	11	8	9	18
Atyrau	-	1	-	17	17	1	-
Karaganda	1	-	10	5	12	3	1
Kokshetau	-	-	13	2	15	-	-
Kostanay	4	6	-	6	6	1	9
Pavlodar	6	5	-	11	6	-	16
Petropavlovsk	-	-	2	16	17	-	1
Taraz	-	-	-	12	12	-	-
Uralsk	23	1	1	10	5	1	29
Ust-Kamenogorsk	10	-	4	3	5	10	2
Shymkent	-	9	-	9	9	4	5
Total	45 (18.6%)	44 (18.2%)	31 (12.8%)	122 (50.4%)	116 (48.0%)	44 (18.2%)	82 (33.8%)

* According to the number of suspects/accused present at the hearing.

The monitoring revealed a lack of uniform practice in the use of restraining devices and security measures during court hearings. Handcuffs and placement into the defendant's box are used inconsistently, in some cases apparently at the discretion of the security escort rather than the court.

It should be borne in mind that in accordance with the principle of presumption of innocence the suspect/accused is deemed not guilty and should fully enjoy his/her civil rights and freedoms. This means that handcuffing in the courtroom, in the presence of security escort and court marshals, at this procedural stage may be excessive and premature, since no decision has yet been taken with regard to whether the suspect/accused should be detained.

Recommendation

Transfer the decision-making on physical restraint to the exclusive competence of the judge. This will promote the judiciary's authority and facilitate the development of a more consistent practice in the use of restraining devices and security measures in respect of the suspects/accused.

4.7.5. Use of audio/video devices to record detention hearings

The **use of audio/video devices** serves as a safeguard of reliability that the procedural documents reflect the progress and outcomes of the court hearing. The judicial system has made significant efforts to equip courthouses with the requisite technical means.¹⁴⁹ CCP Article 150(6) requires that minutes be kept of detention hearings.

Table 11. Court hearing recording

City	Audio/video recording			Minutes of the hearing			
	Yes	No	Not clear	Yes	No	Not everything recorded	Incorrect stage
Aktau	-	1	-	1	-	-	-
Aktobe	-	20	-	20	-	-	-
Almaty	4	29	12	19	16	10	-
Atyrau	-	20	-	16	4	-	-
Karaganda	-	19	-	19	-	-	-
Kokshetau	-	19	1	8	10	2	-
Kostanay	6	13	1	15	-	5	-
Pavlodar	-	20	-	18	-	1	1
Petropavlovsk	-	16	4	20	-	-	-
Taraz	-	10	-	6	2	2	-
Uralsk	-	39	-	38	-	1	-
Ust-Kamenogorsk	-	20	-	-	3	17	-
Shymkent	-	15	-	12	2	-	1
Total	10 (3.7%)	241 (89.6%)	18 (6.7%)	192 (71.4%)	37 (13.8%)	38 (14.1%)	2 (0.7%)

The monitoring findings show that in the vast majority of cases, even where the courtroom was specially equipped, audio/video recording of the hearing was not made. In some cases court clerks did not take minutes of proceedings in the courtroom.

In the case of G., charged under CC Articles 176(2)(b) and 325(2), heard by the Almalinsky District Court of the city of Almaty on 11 March 2010, the court clerk was not taking minutes of the detention authorization hearing and was periodically checking her cell phone.¹⁵⁰

¹⁴⁹ See e.g. press-release of the Supreme Court of 14 June 2006 at: http://www.supcourt.kz/news/index.php?ELEMENT_ID=2684&phrase_id=4495.

¹⁵⁰ AL-2-1-K-R. Similar situation in AL-2-2-K-R.

Since court hearing minutes and audio/video recordings are important procedural documents that reflect the extent to which human rights and legality principles are met in criminal proceedings, it would be advisable to amend the law to include a requirement of complete audio recording of court hearings and making such recordings a mandatory part of the hearing minutes that are made available to the parties.

Recommendation

Amend the law to include a requirement of complete audio recording of court hearings and making such recordings a mandatory part of the hearing minutes.