

STATEMENT

**by H.E. Ambassador Kairat Abdrakhmanov,
Permanent Representative of the Republic of Kazakhstan to the OSCE with information
on the examination of the appeal submitted by the lawyer Mr. V. Voronov to the Supreme
Court of the Republic of Kazakhstan on relieving Mr. Yevgeny Zhovtis of criminal
responsibility**

(Vienna, 29 April 2010)

Ladies and Gentlemen,

In response to the statements made by delegations of the USA, Canada and the EU, I would like to draw your attention to the following facts.

On 26 April 2010 the Supreme Court of the Republic of Kazakhstan, having considered the appeal submitted by the lawyer Mr. V. Voronov to drop the proceedings against Mr. Yevgeny Zhovtis in connection with his reconciliation with the injured party (Article 67 of the Criminal Code of the Republic of Kazakhstan "Relieving of criminal responsibility due to reconciliation with the victim"), found no reason to initiate review proceedings for the following reasons:

1. In accordance with paragraph 18 of the Supreme Court Statutory Decree No. 4 of 21 June 2001, a declaration of reconciliation can be made only at the inquiry or preliminary investigation stage and in the lower court before the court retires to the consultative chamber to determine its sentence. According to the case files, during the principal hearing Mr. Zhovtis requested that Article 67 of the Criminal Code of the Republic of Kazakhstan on relieving a person of criminal responsibility in connection with reconciliation with the victim not be applied to him because he was not guilty. The Court has taken into account the differences in the position taken in this matter by the lawyer and Mr. Zhovtis himself.

2. The judicial bodies take the view that a road traffic accident resulting in the death of a man occurred because the convicted person (Mr. Zhovtis), despite the fact that he had a chance to prevent running down the pedestrian, did not take any measures to brake and stop his vehicle.

In his original recorded testimony, Mr. Zhovtis admitted that he had been temporarily blinded and his vision seriously impaired. Subsequently in the course of the investigation Mr. Zhovtis changed his testimony as regards being blinded.

In accordance with paragraph 19.2 of the Road Traffic Regulations, when a driver is blinded by a light in the distance he or she is obliged to turn on his or her emergency light signal and, without changing lanes, come to a halt.

We note in this connection that according to the expertise there are no signs that the brakes were applied. What this means, given the poor visibility conditions, is that Mr. Zhovtis did not take any measures to prevent the accident.

3. It should be noted that there is no reason to doubt the conclusions drawn by the forensic experts at the laboratory. This body is an independent institution and has nothing to do with the Ministry of Internal Affairs of the Republic of Kazakhstan or the Office of the Prosecutor General. Similarly, in accordance with the criminal laws of the Republic of Kazakhstan experts bear criminal responsibility for issuing what they know to be false conclusions.

4. The judicial bodies admit that during the consideration of the case there were insignificant procedural violations of non-principal character in the form of an erroneous indication of dates on which investigative operations were carried out. However, these violations had no effect on the essential nature of the arraign and on the determination of the nature of Mr. Zhovtis's actions.

Arguments that Mr. Zhovtis was questioned as witness while he was defined as a suspect cannot constitute proof of violations of his rights, since under the laws of the Republic of Kazakhstan a witness has a broad range of powers. These powers include the right to refuse to testify, to lodge a complaint against the interrogating officer, investigator, prosecuting attorney or court and the right to file a petition as regards his or her rights and legal interests.

5. There has been no full reconciliation between the parties in this case. According to the case files, the legal representatives of the victim were identified as the mother and sister, a fact that is borne out by their statements and a document recognizing them as the injured party. However, Mr. Zhovtis tries to represent that only the mother of the deceased, who had stated that she had no claims against him, had been recognized as the injured party. At the same time, the sister, as the other legal representative of the deceased, has stated that a decision on the matter remains with court, and who according to the record during the trial pleaded: "the decision to be taken by the Court".

It should be noted that the case file includes a declaration on the absence of any claims allegedly from three relatives of the deceased – his mother, his sister and his uncle – drawn up by one person and signed by one person on behalf of all.

6. Taking into account the absence of admission of guilt by Mr. Zhovtis and absence of the fact of reconciliation between the parties, the Supreme Court of the Republic of Kazakhstan rejected the lawyer Voronov's appeal. In accordance with the laws in force Mr. Zhovtis has the right to independently appeal to the Supreme Court with a petition for review of his sentence as well as to Office of the Prosecutor General setting out his position on all the circumstances of the case.

Ladies and Gentlemen,

I would like to come back to the statement of the US delegation which referred to interpretation of the case "as an effort to silence him" (Mr.Zhovtis). This is highly artificial allegation which has nothing to do with the reality. Believe me, there are many other human rights activists in my country with much more louder voice – expressing their views, sometimes not so pleasant for the ears of the Government, with critical approach, scrutinizing every step of the ruling authorities, especially in the sphere of internal development and political modernization. They are very active on our internal and international arena acting freely and independently. Mr.Zhovtis has every opportunity to articulate his thoughts, including in the Internet (he has personal blog). Special attention to this case on behalf of the Government, NGOs, general public and media is the most powerful remedy against any hypothetical attempt to "silence him".

The members of the Supreme Court of Kazakhstan believe that accusations on procedural irregularities of the still ongoing trial and appeal for revision undermine the independence of the judicial system.

It is evident and clear that for certain people and circles this case is "unique" and demands "special" attention. Immediately after the incident, official authorities of Kazakhstan experienced unprecedented pressure on behalf of NGOs and the authorities of the United States.

Mechanisms of international advocacy of human rights and freedoms should not be used as an excuse and a tool for escaping from the responsibility by certain people, which can lead to violation of the principle of equality of everyone before the Law and the Court.

The statement of lawyers on that all motions have been rejected is also not true. During the hearings, 9 out of 15 motions by advocacy were satisfied. The fact that Kazakhstan's judicial system is still maturing does not present any grounds for questioning its credibility.

Unfortunately, behind this rhetoric and efforts to politicize the case, the fact that a person died as a result of Mr. Zhovtis's actions is being ignored. Moreover, he refuses to plead his guilt, which is important when courts rule out decisions.

Currently, more than 100 citizens of Kazakhstan, who have been convicted on similar charges and sentences, closely follow whether Y.Zhovtis will receive any kind of exception to the rule.

All in all, we believe that in the developed democratic societies attempts of pressure upon the court in connection with political activity of the defendant, who was the cause of death of a person, would inflict a serious public blame. Attempts of pressure upon the Kazakhstan executive branch in connection with the court's decisions are considered lawless and not diplomatic for it casts doubts on the independence of judicial system of our country.

I would like to call upon all interested parties to work together in assisting us to solve this pressing issue within the legal framework rather than drawing dividing lines.

INFORMATION ON THE CASE OF YEVGENY ZHOVTIS
(based on the material provided by the Supreme Court of the Republic of Kazakhstan)

On 26 April 2010 the Supreme Court of the Republic of Kazakhstan considered an appeal filed by the lawyer Mr. V. Voronov on behalf of his client Mr. Yevgeny Aleksandrovich Zhovtis, who at that time had already been convicted, to have changes made to the existing court records and to have his client released from criminal responsibility.

Under a verdict delivered by the Balkhash District Court of the Almaty region on 3 September 2009, Mr. Zhovtis was found guilty of having committed the crime provided for in Article 296, part 2, of the Criminal Code of the Republic of Kazakhstan and was sentenced to four years' imprisonment to be served in a colony settlement for persons who have committed negligence-based crimes, in addition to which he was disqualified from driving for a period of three years.

Under a ruling of 20 October 2009 by the criminal affairs chamber of the Almaty Regional Court, the court's sentence was upheld. A ruling issued by the oversight chamber of the regional court on 10 December 2009 turned down a request for a review of the trial documents.

Under the aforementioned provision of the Criminal Code, liability is incurred by a person who, when driving a motor vehicle, violates the traffic regulations in a way that results in the death of a human being through negligence.

The facts of the case: On 26 July 2009, at approximately 10.10 p.m., while travelling in a southerly direction in a "Toyota 4 Runner" car, in good technical condition, along the western carriageway of an unlit stretch of road between Karoi and Almaty at a speed of 80 to 90 kilometres per hour, approaching a point located 131 km and 800 m along that road, Mr. Zhovtis violated provisions 19.2 and 10.1 of the Road Traffic Regulations of the Republic of Kazakhstan. Namely, when blinded by the lights of an oncoming vehicle in the distance, he failed to show the necessary attention or to apply his brakes and stop his vehicle, but, without changing lanes and displaying criminal negligence, continued in the direction in which he was travelling, despite the fact that the roadway as well as possible hazardous objects on it in his path were not visible. Instead, he continued on his way and run down Mr. K. Moldabayev, a pedestrian walking in the same direction at a speed of 5.7 kilometres per hour along the western carriageway.

As a result of this road traffic accident, the pedestrian died of his injuries at the scene of the accident. At the time of his death Mr. Moldabayev was only 35 years of age, and was supporting his elderly mother, who has now lost her only breadwinner and has been left without a means of support.

In accordance with the findings of the forensic medical examination (autopsy) filed under No.127 on 31 July 2009, the cause of Mr. Moldabayev's death was traumatic shock as a result of a closed spinal trauma, a fracture in the area of the articulation between the occipital bone of the skull and the cranial vertebra with damage to the spinal column membranes and substance. The autopsy revealed that there were a closed craniocerebral trauma, bruises, abrasions and bleeding in the soft tissue of the calvaria (skull cap), bleeding under the soft cerebral membranes, a fracture to the area of the articulation between the occipital bone and the cranial vertebra with damage to the membranes and substance of the spinal column, closed fractures of the left hip bone, open fractures in the bones of both knees in the lower third, internal bleeding, abrasions in the facial area, on the surface of the trunk and extremities, and bruising on the back of the left hip. All of these injuries could have been caused as a result of the

traumatic effect of a blunt object or objects such as the protruding parts of a moving vehicle and are regarded as a posing serious harm to health as a threat to life. In this case, they had, in fact, a fatal outcome.

It is clear from the records of the examination of the scene of the accident and of the car that are part of the trial documents that the front bumper was bent out of shape and that the front right part of the hood and the upper right part of the hood exhibited a dent measuring 100 cm by 60 cm indicating that the victim had been thrown as a result of the impact with the car onto its hood and had been carried in that position over a distance of 34 metres and had then fallen from the vehicle, after which the car had travelled an additional 7.5 metres before coming to a halt. This reconstruction of the events was also confirmed in a diagram of the accident signed by Mr. Zhovtis himself and by the witnesses Mr. M Aytmagambetov and Mr. K Orynbayev.

Under paragraph 10.1 of the Road Traffic Regulations, a driver of a motor vehicle must not exceed the prescribed speed limit, taking into account the intensity of the traffic, the particular features and condition of his or her vehicle and freight it might be carrying, and the road and weather conditions, in particular visibility in the direction in which he or she is travelling. Should there arise an obstacle and/or hazard that the driver is able to detect, he or she must take measures to reduce his or her speed up to the point of stopping altogether or to circumvent the obstacle in a way that poses no danger to other road users.

In accordance with paragraph 19.2 of the same Regulations, when blinded by an oncoming light in the distance, the driver must turn on his or her emergency light signal and, without changing lanes, come to a halt.

According to the findings of the technical examination of the vehicle carried out (No. 8001 of 14 August 2009), in this accident, had the driver (Mr. Zhovtis) applied his brakes from the moment he found himself blinded, it would have been technically possible for him to avoid running down accident by bringing his car to a halt before the point at which he struck him, since the latter was walking at a moderate pace in the same direction. Had the driver applied his brakes in time, the pedestrian could have moved further away to a safe distance from the point at which he was struck, as a result of which he would have not been run over.

Thereby, although it was in his power to avoid running down the pedestrian, Mr. Zhovtis failed to take any measures to apply his brakes and stop his vehicle.

Under paragraph 1 of Supreme Court Statutory Decree No. 4 of 21 June 2001, as amended and supplemented, "On judicial practice as regards the application of Article 67 of the Criminal Code of the Republic of Kazakhstan", the proper application of the practice of reconciliation between parties is designed to help increase the role and involvement of the victim in the criminal process and to restore fully and without delay his or her violated rights and freedoms, while at the same time pursuing the aim of displaying a humane attitude towards persons who have committed crimes of minor or average severity and who have subsequently demonstrated positive behaviour as expressed in reconciliation with the victim and the payment of damages.

In accordance with paragraph 18 of the aforementioned Supreme Court Statutory Decree, a declaration of reconciliation can be made only at the inquiry or preliminary investigation stage and in the lower court before the court retires to the consultative chamber to determine its sentence.

The trial records contain a statement allegedly on behalf of three relatives of the deceased – his mother, his sister and his uncle – written by one person and also signed by one person on behalf of all.

During the trial, the deceased's sister, Ms. T. Kudabekova, never stated that she had become reconciled with Mr. Zhovtis and did not request that the trial be discontinued, rather, in

response to a question by the judge, she replied that her wish was that a decision be taken according to the law.

In view of these points and the fact that Mr. Zhovtis has not admitted his guilt and has requested that Article 67 of the Criminal Code of the Republic of Kazakhstan not be applied to his case, this article of the Criminal Code has in fact not been applied.

Under paragraph 16 of the aforementioned Supreme Court Statutory Decree, in accordance with Article 38, part 5, of the Code of Criminal Proceedings, a case may not be discontinued if the suspect, the accused or the victim objects to this. In such cases, the trial continues in the usual fashion.

In the case in question, there was no possibility of discontinuing the trial as a result of reconciliation between the parties, and the court continued to act in the usual manner.

The appeal filed to the Supreme Court by Mr. Voronov, the lawyer for the accused, requests that Article 67 of the Criminal Code be applied to Mr. Zhovtis, who has now been found guilty, and that he be released from criminal responsibility and punishment in accordance with Article 38, part 1, of the Code of Criminal Proceedings.

It must be noted that this position is not in accordance with the position taken by the convicted person himself, as read out in the lower court, to the effect that Article 67 of the Criminal Code should not be applied to his case.

Under paragraph 19 of the aforementioned Statutory Decree and in accordance with Articles 405, 410, 412, part 3, paragraph 1, of Article 415 and part 7 of Article 467 of the Code of Criminal Proceedings, release from criminal liability on the basis of Article 67 of the Criminal Code in an appeal or oversight procedure is possible only in the event that a lower court uncovered circumstances providing a basis for the application of Article 67 of the Criminal Code.

Considering that there are no grounds for accepting the appeal filed by Mr. Voronov, the lawyer, to discontinue the trial as a result of reconciliation with the victim's relatives, following a preliminary review of Mr. Voronov's application on behalf of Mr. Zhovtis the Supreme Court of the Republic of Kazakhstan did not find any grounds for instituting oversight action to review the trial documentation.

A review of this criminal case not revealed violations of Mr. Zhovtis's constitutional rights, procedural violations. In handing down their decisions, the courts were guided by the legislation of the Republic of Kazakhstan.

The appeal filed by the lawyer, Mr. Voronov, and the hearing conducted by the oversight chamber of the Supreme Court, which considered and rejected his petition, do not prevent Mr. Zhovtis himself, who has now been convicted, from appealing to the Supreme Court for a review of his sentence and also to the Office of the Prosecutor General, setting out his position as regards all the circumstances of the case. Such an appeal by the convicted person could contain a request for the application of the provisions of Article 67 of the Criminal Code of the Republic of Kazakhstan.