

LEGAL OPINION
ON QUESTIONS RELATED TO MISSIONARY ACTIVITY
AND THE INCURRING OF ADMINISTRATIVE ACCOUNTABILITY

I, Professor of the Caspian Public University, Doctor of Law R.A. Podoprigora, prepared this opinion in connection with an inquiry received from the Religious Center of Jehovah's Witnesses in the Republic of Kazakhstan (RK) (Ref. No. 148 of September 15, 2008).

In the process of preparing this document the following statutory legal acts were used: the Kazakhstan Republic Law on Freedom of Worship and Religious Organizations (sic) of January 15, 1992; the Kazakhstan Republic Code of Administrative Violations of January 30, 2001; and the Kazakhstan Republic Law on Introducing Amendments and Addenda into Certain Legal Acts of the Kazakhstan Republic on Issues Regarding the Ensuring of National Security of July 8, 2005.

The following questions were posed in giving the opinion:

1. How and by what is the concept of "missionary activity" defined in the RK?

The concept of missionary activity is defined in Article 1 (1) of the Kazakhstan Republic Law on Freedom of Worship and Religious Organizations of January 15, 1992 ("Law on Freedom of Worship"). According to point 2 of the given article, missionary activity is defined as **the preaching and dissemination by means of religio-educational activity of a creed that is not contained in the founding documents of a religious association carrying out its activity on the territory of the Kazakhstan Republic.**

Article 1(1) appeared in the Law on Freedom of Worship in 2005 in connection with the passing of the Kazakhstan Republic Law on Introducing Amendments and Addenda into Certain Legal Acts of the Kazakhstan Republic on Issues Regarding the Ensuring of National Security of July 8, 2005. Until 2005, there was no definition of the concept of missionary activity in the Law on Freedom of Worship.

At the same time, it should be taken into account that in accordance with Article 4 (2) of the Law on Freedom of Worship, in order to register with the local executive authorities, missionaries must present, among other documents, a formal invitation from a religious association registered in the Kazakhstan Republic.

Thus, Article 4(2), which establishes the requirement to present the invitation of a religious association registered in Kazakhstan, contradicts Article 1(1), inasmuch as it assumes that the Kazakhstan association is inviting an individual for the purpose of preaching his faith; yet such preaching does not fall within the bounds of the definition of missionary activity according to article 1(1). The invitation of an individual by a religious association of one denomination to preach a difference faith appears to be absurd.

Taking into account that Article 1(1) of the Law on Freedom of Worship establishes general concepts, and article 4(2) is dedicated more to procedural issues, Article 1(1), in our opinion, has precedence.

2. Is a foreigner—one invited to the RK by a registered local religious association, and preaching, on the territory of the RK, a creed reflected in the charter of the given religious organization—“a person carrying out missionary activity”?

According to the substance of the article indicated above, Article 1(1) of the Law on Freedom of Worship, the preaching and dissemination of a creed that is contained in the charter of a religious association carrying out its activity on the territory of the RK is not missionary activity.

Thus, a foreigner invited to the Republic of Kazakhstan by a registered local religious association and preaching on the territory of Kazakhstan a creed reflected in the charter of the given association cannot be considered to be a person carrying out missionary activity.

The inadequacy of the legal wording here should be noted: a faith cannot be contained in founding documents; the latter only include several points relating to beliefs or practices. The substance of the law assumes that a religious association active on the territory of the Republic of Kazakhstan, whose activity encompasses preaching and the dissemination of its beliefs—which [activity] is not included in the concept of missionary activity—should be registered with the state authorities, since under Article 4 of the Law on Freedom of Religion, the activity of religious associations not registered in accordance with the legally established procedure of the Kazakhstan Republic is not permitted.

3. Would it be different if the beliefs reflected in the charter of a registered local religious association were preached not by a foreigner, but by a citizen of the RK invited to do so by the local religious association?

The law does not link the definition of missionary activity to the contingency of its being carried out by a citizen of the Republic of Kazakhstan, by a foreign national, or by a person without citizenship. Thus, the preaching of religious beliefs contained in the founding documents of a religious association carrying out its activity on the territory of the Republic of Kazakhstan, by an invited citizen of the Republic of Kazakhstan, just as in the case of a foreign national or a person without citizenship, does not fall within the concept of missionary activity.

4. Under what circumstances may a foreigner or citizen of the RK be defined as a person carrying out missionary activity in the RK?

According to the substance of the Law on Freedom of Worship, these persons should include a citizen of the Kazakhstan Republic, foreign nationals, or persons without citizenship, residing in Kazakhstan (or staying in Kazakhstan) with the goal of preaching religious doctrine that has not previously manifested itself in Kazakhstan, [a doctrine] that does not have a corresponding organization or is being preached by an unregistered religious association. At the same time it must be noted that the requirements set forth for missionaries to receive registration that are listed in Article 4(2) of the Law on Freedom of Worship indirectly indicate that the regulations on missionary activity apply primarily to foreign citizens. For example, when presenting documents to receive registration, the applicant must present a passport, or other document verifying his identity, that has been registered according to established procedure. Under Kazakhstan law, the only passports that require registration are those of foreign citizens.

5. *Under the RK Law on Freedom of Worship and Religious Associations, were Mr. Jaracz and Mr. Kikot required to receive registration as missionaries in order to give 30-minute talks, as described above?*

According to Article 4(1) of the Law on Freedom of Worship, citizens of the Republic of Kazakhstan, foreigners and persons without citizenship shall carry out missionary activity on the territory of the Republic of Kazakhstan after going through the process of recorded registration. Carrying out missionary activity without recorded registration is forbidden.

At the same time, the concept of missionary activity is defined in Article 1(1) of the same law. In our opinion, Mr. Jaracz and Mr. Kikot were not required to go through the process of recorded registration for the following reasons:

a) The individuals named were invited by a religious association registered in Kazakhstan, accordingly, preaching and dissemination of the beliefs of this religious association according to the substance of Article 1(1) is not classified as missionary activity;

b) Religious organizations may invite foreign nationals for various purposes (administrative, consultative, interchange of experience, et al.), therefore, not all activity of a foreign national invited by a religious organization can be classified as preaching and dissemination of faith, or, in other words, as missionary activity. From the description of the situation it is evident that Mr. Jaracz and Mr. Kikot were not engaged in missionary activity (even if [missionary activity] were to be understood more broadly than it is in Kazakhstan legislation);

c) It is assumed that missionary activity has an external character, that is, it is aimed at unbelievers or at believers of other religions (proselytism) beyond the borders of the religious association itself. Judging from the [materials of your] inquiry, Mr. Jaracz and Mr. Kikot came to participate in internal activities of the religious association; they were not engaged in preaching and disseminating beliefs among persons who were not members of the given religious association. The immediate event, for participation in which they were called to administrative accountability, was also of an internal nature and was not directed to those outside; it was not related to drawing outsiders into the religious association (as is the case in missionary activity). Such participation testifies to the absence of indications of missionary activity.

6) *Are there procedural violations of the administrative or other legislation of the RK in the facts described above?*

On the basis of the given description of the situation, the following procedural violations of law can be found:

a) The illegality of taking [into custody] and administrative detention.

The immigration police officers did not have the right to take Mr. Jaracz and Mr. Kikot [to the police station] or to detain them, even if, in the opinion of the police authorities, they committed an administrative violation.

According to Article 618 of the Kazakhstan Republic Code of Administrative Violations (CAV), measures to ensure the conducting of a case involving an administrative violation, which include the measures of taking into custody and administrative detention, are to be applied for the purpose of constraining [an individual committing or about to commit] an administrative violation, to establish the identity of an

individual suspected of committing [an administrative violation], to draft a protocol for an administrative violation when it cannot be drafted at the location where the administrative violation was committed, and to ensure timely and proper investigation of a case and the execution of a summons that has been received regarding a case.

If the foreign nationals indicated had their passports with them and did not offer any resistance to the police officers, there was no need to take them into custody or for administrative detention.

b) The implementation of procedural actions is not stipulated by law.

Taking [into custody] and administrative detention, according to Article 618 of the CAV are usually performed to draft a protocol regarding an administrative violation. No procedural opportunities for the conducting of questioning at this stage are stipulated by legislation.

c) Possible exceeding of the time period for administrative detention.

According to Article 622 of the CAV, administrative detention is to be carried out for a period of time necessary for the goals indicated in Article 618 of the CAV (cf. point “a”) to be achieved, and cannot last longer than three hours. The period of administrative detention is calculated from the moment the physical person is taken [into custody]. On the basis of the description of the situation it is not clear at what time Mr. Jaracz and Mr. Kikot were taken to the District Police Station (DPS) and at what time they were released; therefore it is not possible to give a precise answer concerning a possible procedural violation.

d) The terms for sending the protocol and hearing the case for an administrative violation.

According to Article 640 of the CAV, the prosecutor’s application must be sent for a hearing, within a period of 72 hours from the time of its drafting, to the judge or authorities (the responsible individual), or to the individual authorized to hear the case of administrative violation. Thus, the prosecutor’s office did not technically violate the law.

According to Article 647(3) of the CAV, a case concerning an administrative violation, the committing of which incurs expulsion outside the borders of the Republic of Kazakhstan, must be heard on the day the protocol of the administrative violation and the other materials of the case are received. Inasmuch as Article 375(3) stipulates accountability in the form of administrative expulsion, the case should have been reviewed on the day the protocol (read: the prosecutor’s application) was received. Thus, the term for reviewing the case was not violated either. Nor does legislation stipulate on what days or at what times cases of administrative violations may be heard.

At the same time, according to Article 577 of the CAV, the objectives for cases of administrative violations are: that they be conducted with a timely, comprehensive, complete, objective elucidation of the circumstances of each case; that it be ruled on in conformity to the CAV; that the implementation of the ruling handed down be ensured; and also that the grounds and conditions that contributed to the committing of the administrative violations be elucidated.

The hearing of the case in such an accelerated way hardly bespeaks a comprehensive, complete and objective elucidation of the circumstances of the case.

According to Article 647(2), in the event that motions are entered by the participants in a trial for an administrative violation, or if additional elucidation of the circumstances of the case is needed, the term for reviewing the case may be extended, by

the judge hearing the case, but not by more than one month. Thus, the individuals brought to administrative accountability may enter motions, however, the matter of prolonging the case is decided at the judge's discretion.

e) The right to defense.

According to Article 23(1), everyone has the right to receive, in the process of an administrative trial, qualified legal assistance in conformity with the law.

According to Article 584(1), an individual regarding whom a case involving an administrative violation is being conducted, has the right to make use of the services of a defense attorney.

According to Article 589(1), the participation of a defense attorney in an administrative violation trial is mandatory in cases in which the individual called to administrative accountability does not have a command of the language in which the trial is being conducted, which applies in the situation described.

According to part 2 of that same article, if, in the presence of circumstances stipulated in the first part of the this article, a defense attorney is not requested by the individual being called to administrative accountability himself, by his legal representatives, or by other persons acting at his behest, the judge who is authorized to try the case of administrative violation is obligated to ensure the participation of a defense attorney at the corresponding stage of the trial, concerning which they must issue the order required by the attorneys' professional organization.

According to Article 588(2) of the CAV, those who may serve as defense attorneys include lawyers, a husband (wife), close relatives or legal representatives of the individual called to administrative accountability, representatives of trade unions and of other social associations involved with the concerns of the members of these associations. Thus, the religious association's legal consultant cannot be viewed as a defense attorney.

According to Article 588(3), the defense attorney is permitted to participate in the case from the moment the individual called to administrative accountability is subjected to administrative detention, or from the time the protocol of the administrative violation is written.

Consequently, serious violations were committed in the area of securing the foreign nationals' rights to defense.

f) The language of the trial.

According to Article 21 of the CAV, trials for administrative violations in the Republic of Kazakhstan are conducted in the official language, and if necessary for the trial, on an equal basis the Russian language or other languages are used (part 1).

The proceedings must be explained to individuals participating in the case who do not have a command, or an adequate command, of the language in which the trial is being conducted; and their right to make statements, to give explanations and testimony, to enter motions, to present complaints, to become familiar with the case file, and to make statements during the trial in their native language or in another language of which they have a command, and to employ the services of an interpreter without cost, is to be ensured (part 3).

Participants in a trial for administrative violations shall be provided without cost with a translation into the language of the trial of case materials required of them by law that were written in another language (part 4).

Procedural documents to be delivered to the accused and to the complainant should be translated into their native language or into a language of which they have a command (part 5).

Expenses for translation and the services of an interpreter are to be paid at the expense of the state budget (part 6).

According to Article 584(1) of the CAV, an individual respecting whom a trial for an administrative violation is being conducted has the right during the trial to make statements in his native language or in a language of which he has a command, and to employ the services of an interpreter if he does not have a command of the language in which the trial is being conducted.

Judging by the contents of the inquiry, the foreign nationals were deprived of their rights in connection with the language of the trial, and at the time the protocol was drafted, and in the process of the hearing of the case, and in the pronouncement and announcement of the ruling.

g) Evidence

According to Article 604(2), factual information, on the basis of which, according to procedure established by the CAV, the judge in whose docket the case of administrative violation is found shall establish the presence or absence of the fact of an administrative violation, the guilt of the physical person called to administrative accountability; in addition, other circumstances significant for the proper resolution of the case are established: by the explanations of the individual called to administrative accountability; by the testimony of the complainant and witnesses; by opinions of an expert; by material evidence; by evidence from certified special controlling and measuring technical means and equipment; by other documents; and by protocols about the administrative violation and protocols stipulated in the CAV.

Thus, much of the evidence set forth in the inquiry is admissible (the explanatory statement, the statements of individuals, the letter from, the mayor's office [akimat]) and other evidence is inadmissible (the video recording of fragments of Mr. Jaracz's and Mr. Kikot's talks, made by the prosecutor's office).

h) The appeal decision.

According to Article 665 of the CAV, a material violation of the procedural norms of the CAV constitutes grounds for reversing or changing a ruling in a case of administrative violation, and for rendering a judgment.

According to article 668(3) of the CAV, a ruling must, without exception, be reversed if:

--the case was heard without the participation of a defense attorney, when a defense attorney's participation is required by law, or if the right of the individual regarding whom the trial is being conducted to a defense attorney has been violated in some other way;

--if the right of the individual regarding whom the trial is being conducted to use his native language or a language of which he has a command, and to the services of an interpreter, has been violated;

In addition, the language of the trial and the securing of rights to qualified legal assistance are among the principles of legislation on administrative violations secured in Chapter 2 of the CAV. According to Article 8 of the CAV, the significance of the principles of legislation regarding administrative violations consists in the fact that their

violation, depending on the character and substance of the violation, requires that the decision in the trial that has been conducted be rendered null and void, and that the rulings rendered in the course of such a trial be reversed, or that the materials gathered in the trial be declared not to have the force of evidence.

Thus, the decision of the court that rendered the decision in the case of the administrative violation should have been reversed by the higher court on procedural grounds, if for no other reason.

[signature]

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September 17, 2008
Almaty

[notarization of R.A. Podoprigora's signature]