
Bulletin No. 2

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Legal analysis of the candidate registration procedure in 2011 elections for the Office of President of the Republic of Kazakhstan

I. Verification of compliance of a presidential candidate with the requirements of the Constitution of the Republic of Kazakhstan

1. Verification of compliance of a presidential candidate with the requirements of para.3, Article 33 of the Constitution

In conformity with para 3, Article 33 of the Constitution, citizens who have been recognised by the court as legally incapacitated, as well as those in places of detention, sentenced by a court, do not have the right to vote and be elected and to participate in a national referendum.¹ The requirement of the Constitution regarding the legal capacity of a candidate corresponds to the generally accepted practice and international standards.² One debatable rule is that a candidate for President cannot be a citizen held in places of detention, sentenced by a court, because this has a broad interpretation in the Kazakh legislation. Thus, paras.3 and 4, Article 4 of the Constitutional Law “On Elections in the Republic of Kazakhstan” (hereinafter- the Election Law) state that a candidate for the Office of President cannot be a person with a criminal record, which has not been spent or expunged according to the procedure established in law, or a person found guilty by a court, according to procedure established in law, of a crime or administrative offence involving corruption.³

This norm came into force in May 1998.⁴ Prior to its coming into force, there was a decision by the Constitutional Council which established that the provision of the Law

¹ The Constitution of the Republic of Kazakhstan (adopted at the national referendum on 30 August 1995) (with changes and amendments as of 02.02.2011).

² Subpara 1.1.d (iv, v), para 1, Code of Good Practice in Electoral Matters. Guidelines and explanatory report (adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002). Conclusion n° 190/2002, CDL-AD (2002) 23. URL: [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.asp). (hereinafter – Code of Good Practice in Electoral Matters).

³ The Constitutional Law “On Elections in the Republic of Kazakhstan” of 28.09.1995 N 2464.

⁴ Before 1998 Article 4 of the Decree of the President, having the force of the Constitutional Law, “On Elections in the Republic of Kazakhstan” had only requirements similar to para. 3 of Article 33 of the Constitution. The Constitutional Law of the Republic of Kazakhstan of 8 May 1998 N 222-1 “On Introduction of changes and amendments into the Decree of the President of the Republic of Kazakhstan, having the force of the Constitutional Law “On Elections in the Republic of Kazakhstan”” introduced the said amendments into Article 4.

- that a person whose criminal record at the time of registration has not been spent or expunged according to the procedure established in law is not eligible for registration as a candidate for the Office of President - does not have a discriminatory character. The Constitutional Council found the restriction of the passive electoral right justified, since this right is not included in the exhaustive list of rights and freedoms of an individual and a citizen, which are not subject to restriction under any circumstances.⁵

This interpretation by the Constitutional Council differs from international standards and principles of a democratic state. Deprivation of the passive electoral right as a result of a conviction for any offence violates the principle of proportionality, laid out in para.24 of the 1990 OSCE Copenhagen Document.⁶

The Code of Good Practice in Electoral Matters by the Venice Commission also states that, the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them; the deprivation must be based on a criminal conviction for a serious offence.⁷

The OSCE Office for Democratic Institutions and Human Rights (hereinafter – OSCE/ODIHR) repeatedly recommended changing the norm prohibiting the registration of candidates with unspent criminal record with the purpose of bringing it in line with the international standards.⁸

2. Verification of compliance of a presidential candidate with the requirements of para.2, Article 41 of the Constitution

In conformity with para 2, Article 41 of the Constitution, to be elected President a citizen has to be fluent in the state language. The phrase “fluent in the state language”, according to the Resolution of the Constitutional Council of 9 October 1998, should be understood as “competence in reading and writing, expressing thoughts easily and without difficulties and speaking publicly in the Kazakh language”.⁹

The decision on a candidate’s fluency in the state language is taken by the Linguistic Commission, set up by the Resolution of the Central Election Commission, comprising linguists and other specialists, numbering at least 5 persons.¹⁰ At the

⁵ Resolution of the Constitutional Council of the Republic of Kazakhstan of 9 April 2004 No.5 “On Verification of Compliance of the Constitutional Law of the RK “On Introduction of changes and amendments into the Constitutional Law of the RK “On Elections in the Republic of Kazakhstan” with the Constitution”.

⁶ Document of the Copenhagen meeting of the Conference on the human dimension of the CSCE. Copenhagen, 29 June 1990, states in para.24: “Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law”. URL:<http://www.osce.org/ru/odihr/elections/14304>

⁷ See footnote 2.

⁸ OSCE/ODIHR, “Republic of Kazakhstan. Assessment of the Constitutional Law on Elections. Warsaw, 24 August 2004”. URL: <http://www.osce.org/ru/odihr/elections/35973>.

⁹ Resolution of the Constitutional Council of the Republic of Kazakhstan of 9 October 1998 No. 9/2 “On the Official Interpretation of Paragraph 2 of Article 41 of the Constitution of the Republic of Kazakhstan” (hereinafter – Resolution of the Constitutional Council No. 9/2).

¹⁰ Para.2 of Article 54 of the Election Law.

same time the Election Law and the Statute on the Central Election Commission (hereinafter “the Election Commission) do not contain the norms regulating the powers, the setting-up procedure, the main obligations and the working principles of the Linguistic Commission.¹¹

At present the procedure of testing the candidates by the Linguistic Commission is regulated by the by-law – the Resolution of the Election Commission, which does not prescribe the procedure relating to the composition of the Linguistic Commission itself.¹² Specifically it does not stipulate the criteria for the selection of the linguistic specialists, does not explain which “other specialists” can be included in the Commission, the length of their professional experience, which areas of knowledge they must represent, the necessity of possessing an academic qualification and so on. The Resolution lacks such important norms as the provision regarding conflict of interest of the members of the Linguistic Commission and the members of the Election Commission when forming the Linguistic Commission; nor does it provide for the opportunity to challenge the members of the Commission.

It was noted in the official commentaries of the Election Commission on the Interim OSCE/ODIHR Report No.1,¹³ that the Linguistic Commission was composed of the leading linguists of the Republic of Kazakhstan and all the members of the Linguistic Commission are Doctors of Philology and acknowledged academicians in the sphere of Kazakh Philology.¹⁴

The Resolution only superficially describes the procedure for conducting examination of the knowledge of the state language. It only states that in order to establish fluency in the state language it is required to produce a written assignment of no more than two pages on a topic chosen by the Linguistic Commission; to read a printed text of no more than three pages chosen by the Linguistic Commission; to deliver a public presentation of not less than fifteen minutes on a topic chosen by the Linguistic Commission.¹⁵ At the same time the text of the Resolution does not describe a clear procedure for selecting the topics of the written and oral assignments, nor does it state whether the candidates are given the topics of the assignments in advance to prepare for the examination; it lacks a distinct system of evaluation of assignments and there is no guidance regarding the number of errors permitted in written and oral submissions. The Resolution does not provide for the opportunity to ask questions of the examinee on the part of the members of the Linguistic Commission. At the same time it is known that in the course of 2011 early presidential elections, in one case a candidate was asked additional questions which

¹¹ See The Election Law and the Statute on the Central Election Commission (Endorsed by the Decree by the President of the Republic of Kazakhstan of 11 November 1996 N 3205).

¹² Resolution by the Central Election Commission of the Republic of Kazakhstan of 31 August 2005 No. 12/26 “On the Procedure of Establishing Fluency in the State Language of a Candidate for the Office of President of the Republic of Kazakhstan” (hereinafter – the Resolution).

¹³ Interim Report No. 1 (1-14 March 2011) by the OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan. URL: <http://www.osce.org/ru/odihr/76207>.

¹⁴ Commentary by the Central Election Commission of the Republic of Kazakhstan on Interim Report No. 1 (1-14 March 2011) by the OSCE/ODIHR Election Observation Mission, 2011 Early Presidential Elections in the Republic of Kazakhstan.

URL: http://election.kz/portal/page?_pageid=73,1578432&_dad=portal&_schema=PORTAL. (hereinafter – Commentary of the Election Commission on Interim Report No. 1).

¹⁵ Paragraph 3 of the Resolution of the Election Commission.

affected the decision of the Linguistic Commission.¹⁶ Furthermore, the Resolution does not contain a requirement regarding the mandatory taking of minutes and does not describe the procedure to appeal the decisions of the Commission.

Analysis of the Kazakhstani legislation demonstrates that there are no clear-cut criteria to determine fluency in the state language of presidential candidates, thus allowing the Linguistic Commission to arbitrarily determine the parameters of the examination process in each individual case. The activities of the Linguistic Commission violate the norms of Article 39 of the Constitution with regard to prohibiting the restriction of rights of candidates through the use of by-laws, i.e. the Resolution of the Election Commission.

It should be noted that as early as in 2005, the OSCE/ODIHR Election Observation Mission Final Report regarding the 2005 Presidential Elections pointed out that “the requirement of Article 54 of the Election Law does not state fair and objective standards for determining fluency in the state language so that a candidate will know how he or she will be evaluated. Although the CEC issued a decision in this regard, such criteria should be more appropriately established by law”.¹⁷ Up to now the Election Commission has not provided official commentary on ODIHR recommendations regarding this issue.¹⁸

With regard to the requirement of para.2, Article 41 of the Constitution, which states that in order to be elected President of the Republic of Kazakhstan a citizen must have been resident in Kazakhstan for the preceding fifteen years, the Election Law does not have norms regulating the procedure for confirming the fact of uninterrupted residence. It is not sufficiently clear whether long-term business trips, or being a staff member of a diplomatic corps, that is, activities involving long absences from the territory of the Republic of Kazakhstan, should be considered when calculating this period.

The Venice Commission points out that the right to vote and to be elected may be accorded to citizens residing abroad. According to the experts of the Commission, a length of residence requirement may be imposed on nationals solely for participation

¹⁶ It is noted in the Commentary of the Election Commission on Interim Report No. 1: “Candidate U. Kaisarov was tested by the Linguistic Commission in conformity with Resolution 12/26 of 13 February 2011. The decision about fluency in the state language of the candidate was made jointly by 5 members of the Linguistic Commission. The Linguistic Commission, whose members were Doctors of Sciences, acknowledged specialists in the sphere of Kazakh Philology, found 28 mistakes, while an expert, appointed by the court, who found 17 mistakes, was a teacher of the Kazakh Language. In addition since the day the above-mentioned document had been adopted, no changes regarding testing were introduced. There was no tightening of requirements or increase in the complexity during the test: since candidate Kaisarov failed to demonstrate his knowledge in a conclusive manner, he was asked additional questions.”

¹⁷ Final Report of the OSCE/ODIHR Election Observation Mission, 2005 Presidential Elections. URL: <http://www.osce.org/ru/odihr/elections/kazakhstan/18153>.

¹⁸ See Statement of the Central Election Commission of the Republic of Kazakhstan on the Final Report of the OSCE/ODIHR Election Observation Mission, Presidential Elections in the Republic of Kazakhstan of 4 December 2005.

URL: http://election.kz/portal/page?_pageid=73,207307&_dad=portal&_schema=PORTAL; See Conclusion on recommendations reflected in the OSCE/ODIHR Election Observation Mission Report on Elections to the Majilis of the Parliament of the RK on September 19 and October 3, 2004, and on recommendations reflected in the Needs Assessment Report of the OSCE/ODIHR Mission of September 13-17, 2005 regarding the forthcoming presidential elections of 4 December 2005.

URL: http://election.kz/portal/page?_pageid=73,95687&_dad=portal&_schema=PORTAL.

in local or regional elections;¹⁹ the required period of residence must not exceed six months; a longer period may be established only to protect national minorities.²⁰

Imposing an uninterrupted residence requirement, on the one hand, may contradict the norms prohibiting discrimination,²¹ and, on the other hand, the requirement regarding the long period of uninterrupted residence indirectly encumbers the realization of a guarantee regarding the right of citizens to freedom of movement,²² clearly entrenched in the Constitution.

It is assumed that this requirement can be justified provided that a reduction is made to the required period of uninterrupted residency in the territory of the Republic of Kazakhstan, that potential exceptions from this rule be specified as well as the procedure to verify the information provided by a candidate about the place of his residency. In international practice there is no uniform mechanism to regulate this issue. Nevertheless it is clear that the legislation of the Republic of Kazakhstan should not restrict the opportunity of citizens to be elected to the Office of President to such a significant extent.

II. Collection of signatures to support a presidential candidate standing for the Office of President

After assessing the compliance of a presidential candidate with the requirements of the Constitution and the Election Law, the critical stage is collection of signatures to support a candidate, after which a contender for the office of President is registered as a candidate and allowed to participate in the elections. In conformity with para.2, Article 56 of the Election Law a presidential candidate must be supported by at least one percent of the total number of voters, equally representing at least two thirds of the Oblasts, a city of national status and the capital of the Republic of Kazakhstan. This requirement of the Law corresponds to the international standards.²³

In order to determine one percent of voters in terms of numbers it is necessary to have a clearly prescribed mechanism for establishing the total number of voters, factoring in changes in the quantitative composition of the population. However, the

¹⁹ Sub-para 1.1.c (iii) of para 1, Code of Good Practice in Electoral Matters, It should be noted that the right to vote in local elections is more often also granted to nationals of foreign states permanently residing in the territory of another state.

²⁰ Sub-para. 1.1. c (iv, v) of para 1, Code of Good Practice in Electoral Matters.

²¹ Article 14 of the Constitution: "1. Every person shall be equal before the law and court. 2. No person shall be subjected to any discrimination on the grounds of origin, social status, professional status or property status, gender, race, nationality, language, religious conviction, beliefs, place of residence or any other circumstances.

²² Article 21 of the Constitution: "1. Every person who is legally in the territory of the Republic of Kazakhstan shall have the right to free movement around its territory and free choice of place of residence except for cases stipulated by law. 2. Every person shall have the right to leave the territory of the Republic of Kazakhstan. Citizens of the Republic of Kazakhstan shall have the right to unimpeded return to the Republic of Kazakhstan".

²³ Sub-para. 1.3. (i, ii) of para 1, Code of Good Practice in Electoral Matters, lays out that presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures, but the law should not require collection of the signatures of more than 1% of voters in the constituency concerned.

Election Law does not contain specific requirements as to the procedure for establishing the number of voters. Thus, according to data from the Statistical Agency of the Republic of Kazakhstan as of 1 February 2011 the population of Kazakhstan totals 16,455,000 people. The Election Commission, by its Resolution of 7 February 2011,²⁴ established the total number of voters at 9,101,000. At the same time, the Resolution does not say on the basis of what calculations the total number of voters was established. Incorrect estimation of the total number of voters may jeopardise the legitimacy of the elections. The lack of clear-cut norms, regarding the sources of ascertaining the number of voters, in the legislation and non-transparency of this process in practice can lead to mistakes and corrupt practices, and also give rise to mistrust of the institution of elections on the part of the society.

When determining the period of time provided for collecting signatures in support of candidates it is necessary to consider several factors. In the course of 2011 pre-election campaign the time frames for preparatory activities were considerably shortened. Nomination of candidates for the Office of President took place from 5 till 20 February 2011. Registration of candidates finished on 2 March 2011.²⁵ Within a fairly short period of time, less than a month, candidates were submitting their nomination applications to the Election Commission, taking their exams for the knowledge of the state language, receiving signature sheets and carrying out the collection of signatures in their support. Taking into account the shortened time-frames to prepare and conduct early elections,²⁶ to issue the signature sheets and to validate the signatures,²⁷ the presidential candidates were supposed to collect 91,000 signatures within a period of up to 13 days. This amounts to more than 7,000 signatures a day, which, in our opinion, is a virtually unattainable requirement, considering the geography of Kazakhstan. Therefore, significant and arbitrary shortening of time-frames to collect signatures indirectly violates the rights of candidates for registration and does not comply with the practices of democratic countries when conducting elections.

The procedure of verification of signatures is regulated by Article 56 of the Election Law. Completed signature sheets in support of candidates for the office of President are submitted to a territorial Election Commission, which, within a 10-day period, carries out validation of signatures with the assistance of the employees of passport services, issues a corresponding protocol and forwards it to the Election Commission. According to the Resolution of 4 February 2011 of the Election Commission verification of signature sheets is to be carried out by enlisting the assistance of the territorial services of the Ministry of Justice and Ministry of the

²⁴ Resolution of the Election Commission of the RK of 07.02.2011 "On Production and provision of signature sheets to candidates for the Office of President of the Republic of Kazakhstan at the early elections for the President of the Republic of Kazakhstan set for 3 April 2011".

²⁵ Resolution of the Central Election Commission of the Republic of Kazakhstan of 04.02.2011 No. 16/22 "On the time-frames for conducting election activities for preparation and conduct of the early elections for President of the Republic of Kazakhstan set for 3 April 2011".

²⁶ See footnotes 24 and 25.

²⁷ Resolution of the Election Commission of the RK of 10.02.2011 No. 19/30 "On the reduction of periods of issuing signature sheets and validation of signatures in support of a candidate for the Office of the President of the Republic of Kazakhstan at the early elections for President of the Republic of Kazakhstan set for 3 April 2011".

Interior. Meanwhile, the absence of transparency and public scrutiny creates room for corrupt practices and manipulation.²⁸ Furthermore the legislation of the Republic of Kazakhstan does not secure the methods of conducting verification and the criteria for declaring signatures invalid.²⁹ At the same time international standards unequivocally state that the process of verification must in principle cover all signatures, but after it has indisputably been established that the required number of signatures has been collected the remaining signatures do not need to be verified.³⁰ The signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample.³¹

In conclusion it must be noted that the procedure of registration of candidates for the Office of President of the Republic of Kazakhstan at the 2011 elections does not comply with the international standards, since there are significant gaps in the legislation with regard to the key aspects of candidate registration process. Thus, the legislation of the Republic of Kazakhstan leaves room for possible manipulation and corrupt practices, while it is necessary for it to establish a clear and transparent mechanism for regulating the process of elections. It is especially important in countries which have no strong tradition for functioning of democratic institutions. This condition is one of the necessary prerequisites for establishing the trust of the society in the institution of democratic elections in the country.



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²⁸ See footnote 27.

²⁹ The procedure for validation of signature sheets has already raised doubts with the OSCE/ODIHR Election Observation Mission. Thus, OSCE/ODIHR Interim Report No. 1 noted that “A lack of clear rules for signature verification led to uneven practice. DEC (District Election Commission) verification protocols contained no reasoning for the invalidation of signatures, and candidates or their proxies were routinely not invited to attend the verification procedures. The OSCE/ODIHR EOM was informed by one nominee for the Office of President that one TEC (Territorial Election Commission) rejected signature sheets due to discovery of technical mistakes”.

³⁰ Sub-para. 1.3. (iv) of para 1, Code of Good Practice in Electoral Matters.

³¹ Sub-para.8 of para.1.3, Explanatory Report, Code of Good Practice in Electoral Matters.