International Covenant on Civil and Political Rights

Distr.: General
10 December 2019

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2724/2016*, **

Communication submitted by:	Konstantin Zhukovsky (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	21 September 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 9 February 2016 (not issued in document form)
Date of adoption of Views:	8 November 2019
Subject matter:	Freedom to impart information; imposition of a fine for participation in peaceful assembly
Procedural issues:	Exhaustion of domestic remedies; State party's failure to cooperate
Substantive issue:	Freedom of expression
Articles of the Covenant:	2 (2) and (3), 19 and 21
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is Konstantin Zhukovsky, a national of Belarus born in 1975. He claims that the State party has violated his rights under article 19 – read in conjunction with article 2 (2) and (3) – and article 21 of the Covenant.[1] The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented by counsel.

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

[1] Although the author did not specifically invoke article 21 of the Covenant in the summary of his complaint to the Committee, he did raise it in the body of his communication. He also argued in his domestic appeals that there had been a violation of article 21 of the Covenant and the communication appears to raise issues under this provision.

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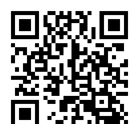

Factual background

2.1 On 25 November 2014, the author, together with another person, was filming a picket by a disabled person in a wheelchair, who had a banner that read "No to lawlessness". The action was taking place at the main square of Svetlogorsk city to protest against violations of the rights of disabled persons. The author had helped the disabled person to organize the event and to transport the banner. While the disabled person was apprehended by police officers, the author left the location where the picketing had taken place. However, an administrative record was filed against him and he was charged with participating in an unauthorized mass event in violation of the article 23.34 of the Belarus Code on Administrative Offences, based on the Public Events Act of 30 December 1997.

2.2 On 23 January 2015, the Svetlogorsk District Court found that the author had violated articles 2, 9 and 10 of the Public Events Act, which requires prior authorization for the organization of a meeting. The Court noted that the disabled person's earlier request to conduct a picket in the city centre was denied based on decision No. 494 of the Svetlogorsk District Executive Committee, which identifies a specifically designated area in the city for the organization of peaceful assemblies. The Court established that the author helped the disabled person to organize the unauthorized event and found him guilty of an administrative offence under article 23.34 of the Belarus Code of Administrative Offences and fined him to 900,000 Belarus roubles.[2]

2.3 On 30 January 2015, the author appealed to the Gomel Regional Court, submitting in his complaint that the Constitution of Belarus gives priority to universally recognized principles of international law and ensures the compliance of national laws therewith. The Constitution, in its articles 23, 33 and 34, guarantees freedom of expression and peaceful assembly and only places limits on to these rights if they pose a threat to national security, public order, health or the rights and freedoms of others. According to the author, such grounds were not present in the current case. In this context, the author argued that the decision of the District Court that found the author in breach of the Public Events Act was inconsistent with the Constitution, as well as with articles 19 and 21 of the Covenant.

2.4 On 20 February 2015, the Gomel Regional Court rejected the author's appeal and upheld the decision of the court of first instance. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court, the Chair of the Supreme Court and the Prosecutor-General of Belarus on 3 March 2015, 27 March 2015 and 6 June 2015, respectively. On 26 March 2015, 12 May 2015 and 18 August 2015, respectively, his appeals were dismissed. The author submits that he has thus exhausted all domestic remedies.

The complaint

3.1 The author claims a violation of his rights to freedom of expression under article 19 read in conjunction with article 2 (2) and (3) of the Covenant, arguing that he was fined for filming a picket that did not pose a threat to national security, public order, health or the rights and freedoms of others.

3.2 The author refers to article 8 of the Constitution, which states that Belarus shall recognize the supremacy of the universally recognized principles of international law and ensure the compliance of laws therewith. He argues that Belarus has given precedence to its national legislation against the international obligations under the Covenant and contrary to articles 26 and 27 of the Vienna Convention on the Law of Treaties, according to which a State party may not invoke the provisions of its internal law as justification for its failure to perform.

3.3 The author argues that the Public Events Act of Belarus and its application should be brought in line with its international obligations under articles 19 and 21 of the Covenant.

[2] The equivalent of approximately $60 on the day of the court ruling.

State party's observations on admissibility

4.1 On 22 July 2016, the State party challenged the admissibility of the communication on the ground that the author had failed to exhaust the domestic remedies. In this context, the State party notes that, following the rejected appeal by a Deputy Chair of the Supreme Court, the author should have sought a supervisory review by the Chair of the Supreme Court, which does not have a statutory limitation.

4.2 The State party submits that the author's rights under article 19 of the Covenant were not violated and that existing national legislation governing mass events creates conditions for the realization of constitutional rights and freedoms of citizens of Belarus and ensures public safety and order when organizing events. The State party further notes that restrictions to this right are reflected in the national legislation and are in line with those that are prescribed in the Covenant, necessary for respect of the rights or reputations of others, as well as for the protection of national security, public order, public health or morals.

Authors' comments on the State party's observations on admissibility

5.1 On 30 August 2016, the author commented on the State party's observations. He submits that he appealed the decisions under the supervisory review proceedings to the Chair of the Supreme Court of Belarus; however, the appeal was rejected by a Deputy Chair. In this context, he argues that the State party failed to explain which of the five deputies should have been addressed in order for the appeal to be reviewed by the Chair of the Court. The author submits that he does not consider the supervisory review procedures to be an effective remedy and adds that the domestic legislation does not allow private citizens to file complaints with the Constitutional Court.

5.2 On 22 September 2016, the author submitted additional comments, noting that, following the State party's observations, he once again appealed under the supervisory procedure to the Chair of the Supreme Court. The appeal was rejected without review on 12 September owing to statutory limitations, contrary to the State party's observations. Thus, the author argues, he has exhausted all available domestic remedies, including those within the framework of the supervisory review proceedings.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the author has failed to seek a supervisory review by the Chair of the Supreme Court of the decisions of the domestic courts. In this context, the Committee considers that filing requests for supervisory review with the president of a court directed against court decisions that have entered into force and depend on the discretionary power of a judge constitutes an extraordinary remedy and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case. The Committee further notes the author's argument that he indeed appealed, unsuccessfully, these decisions under the supervisory review proceedings, namely to the Chair of the Gomel Regional Court, the Chair of the Supreme Court of Belarus and the Prosecutor-General of Belarus, and provided all respective materials in this regard. The Committee notes that in the present case, the author has exhausted all available domestic remedies, including those that constitute supervisory review proceedings, and therefore, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee further notes the author's claim that his rights under article 19, read in conjunction with article 2 (2), of the Covenant were violated. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.[3] The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of his rights under article 19, resulting from the interpretation and application of the existing laws of the State party. The Committee does not consider that an examination of whether the State party also violated its general obligations under article 2 (2) of the Covenant, read in conjunction with article 19, to be distinct from the examination of the violation of the author's rights under article 19 of the Covenant. The Committee therefore considers that the author's claims under article 19 read in conjunction with article 2 (2) are incompatible with article 2 of the Covenant and are therefore inadmissible under article 3 of the Optional Protocol.

6.5 The Committee also considers that the author has failed to substantiate his claims raised under article 19 read in conjunction with article 2 (3) and therefore declares this part of the communication inadmissible.

6.6 The Committee considers that the author has sufficiently substantiated his claims under article 19 of the Covenant for the purpose of admissibility.

6.7 The Committee considers that although the author, who is not represented by counsel, did not claim an article 21 violation in the summary of his communication, the allegations made by the author in the body of his complaint disclose a potential violation of article 21. The case arises out of the participation of the author in a peaceful assembly. He was charged by the State party with a violation under the Public Events Act, and he specifically raised the violation of article 21 in the domestic courts. The State party argues in its observations that the author's rights were limited in terms of the national laws on public events. As a result, the Committee considers that the author has also sufficiently substantiated a claim under article 21, and therefore proceeds with the consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that the courts failed to establish how the restriction on his right to freedom of expression falls within one of the justifications as prescribed by article 19 (3) of the Covenant. The Committee also notes the author's claim that, in the absence of such justifications, his rights under article 19 of the Covenant were violated.

7.3 The Committee recalls in that respect its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it stated, inter alia, that the freedom of expression was essential for any society and constituted a foundation stone for every free and democratic society.[4] It notes that article 19 (3) of the Convention allows for certain restrictions on the freedom of expression, including the freedom to impart information and ideas, only to the extent that those restrictions are provided for by law and only if they are necessary (a) for respect of the rights or reputation of others; or (b) for the protection of national security or public order (*ordre public*), or of public health or morals. Finally, any restriction on freedom of expression must not be overbroad in nature – that is, it must be the least intrusive among the measures that might achieve the relevant protective function and

[3] *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4.

[4] General comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

proportionate to the interest to be protected.[5] The Committee recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.[6] In the absence of any explanations by the State party, the Committee concludes that the rights of the author under article 19 (2) have been violated.

7.4 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right. It is essential for the public expression of an individual's views and opinions and is indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly in a public location collectively with others. The organizers of such an assembly generally have the right to choose a location within sight and hearing distance of their target audience, and no restrictions to this right are permissible unless they are (a) imposed in conformity with the law; and (b) necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.[7]

7.5 The Committee notes that the author was sanctioned for participating in a picket devoted to the rights of disabled persons. The district court found that he had helped organize the gathering. Neither the State party nor the domestic courts have provided any explanations as to how the restrictions placed on him were justified pursuant to the conditions of necessity and proportionality set out in article 21. In the present case, the Committee must consider whether the restrictions imposed on the author's right of assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. The Committee notes, in the light of the information available on file, that the authorities of the State party and the domestic courts have not provided any justification or explanation as to how, in practice, sanctioning his involvement in the peaceful gathering was a legitimate restriction in terms of article 21 of the Covenant.[8]

7.6 In the absence of any explanations by the State party regarding this matter, the Committee concludes that, in the present case, the State party has violated the author's rights under article 21 of the Covenant.

7.7 The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under articles 19 and 21.

8. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take appropriate steps to reimburse any expenses incurred by the author and to provide him with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, in particular by reviewing its national legislation and the implementation thereof in order to make it compatible with its obligations to adopt measures able to give effect to the rights recognized by articles 19 and 21.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when

[5] Ibid., para. 34.
[6] *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.
[7] *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.
[8] Ibid., para. 8.5.

it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.