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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2496/2014*, **

Communication submitted by:	Igor Kostin (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	17 July 2014 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 22 December 2014 (not issued in document form)
Date of adoption of Views:	21 March 2017
Subject matter:	Failure to inform the author of his right to legal aid during cassation proceedings despite being sentenced for serious crimes
Procedural issue:	None
Substantive issues:	Fair trial — legal assistance; fair trial — right to be tried in one's presence
Article of the Covenant:	14 (3) (d) and (5)
Article of the Optional Protocol:	5 (2) (b)

1. The author of the communication is Igor Kostin, a national of the Russian Federation, born in 1981. He claims that the State party has violated his rights under article 14 (3) (d) and (5) of the Covenant. The Optional Protocol entered into force for the State on 1 January 1992. The author is not represented by counsel.

The facts as submitted by the author

2.1 On 20 March 2003, the author was convicted of murder and robbery and sentenced to 18 years' imprisonment. On 21 January 2004, the Supreme Court of the Russian

* Adopted by the Committee at its 119th session (6-29 March 2017).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Mahumuza Laki, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, and Margo Waterval.

Federation acting as cassation court confirmed the lower court judgment.[1] The author submits that because his sentence exceeded 15 years in prison, the participation of a defence attorney in the cassation instance was mandatory in accordance with article 48 of the Constitution and with article 51 (5) of the Code of Criminal Procedure. The author submits that the cassation court did not inform him of his right to legal aid and as a result he did not have a defence attorney during the cassation court hearing.[2]

2.2 The author appealed to the Supreme Court for a revision of the cassation decision in the order of supervision[3] invoking a decision of the Constitutional Court on 8 February 2007, according to which article 51 of the Code of Criminal Procedure does not allow a defendant's right to qualified legal assistance to be limited. It is an obligation of the cassation court to provide a defence attorney if a defendant does not expressly refuse legal assistance. On 17 February 2011, the Supreme Court rejected the author's request for a revision of the cassation court's decision. It found that the Constitutional Court decision did not have retroactive effect and thus could not be applied in the author's case. The general practice of the courts under article 51 of the Code of Criminal Procedure before the Constitutional Court decision of 2007 was not to provide a defence attorney unless expressly requested by a defendant.

2.3 On 7 April 2011, the Chair of the Supreme Court rejected the author's request for a supervisory review of the Supreme Court decision of 17 February 2011. The author's subsequent requests for revision submitted to the Supreme Court concerned the same matter and were rejected on several occasions in 2012 and 2013. The author submitted a request to the Ombudsman's Office for a review of the Supreme Court decisions. On 5 May 2012, the Ombudsman's Office replied that it found no reason for a review of the Supreme Court decisions as the author had already made use of his right to have his sentence revised. The author requested that the Prosecutor General of the Russian Federation submit a request for a review in the order of supervision to the Supreme Court on his behalf. On 11 March 2013, the Prosecutor-General replied that the request could be submitted by the author personally.

2.4 The author applied to the Constitutional Court for clarification of the relevance of the Court decision of 8 February 2007 to his case.[4] The Constitutional Court replied that its decisions had retroactive effect only for the parties of the proceedings before it. In other cases, courts of general jurisdiction could apply the Constitutional Court's decisions retroactively to judgments that had not become final and to final judgments not yet executed or executed in part. The Constitutional Court found that the author had been sentenced in 2003 and that his sentence had been executed before 2007, when the relevant decision of the Constitutional Court was adopted.

2.5 The author submitted a civil claim to Abakan City Court against the Ministry of Finance of the Russian Federation for compensation of moral damage caused by the failure of the cassation court to provide him with a defence attorney. On 27 September 2011, Abakan City Court, referring to the Supreme Court decision of 17 February 2011, found no violation of the author's rights by the cassation court and rejected his claim for compensation. The author contends that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author claims to be a victim of violations by the Russian Federation of his rights under article 14 (3) (d) and (5) of the Covenant.

[1] The decision of the cassation court suggests that the court considered the materials of the case and arguments presented in the cassation plea, maintained by the author at the court hearing. The record of the hearing was not submitted to the Committee.

[2] The author does not clarify whether he was represented at the first instance court. However, it appears that he was represented by counsel from the material on the file.

[3] The submission does not provide the author's plea date, only the date of the decision of the Supreme Court, 17 February 2011.

[4] The author's request to the Constitutional Court is not available on the file; however, the author has submitted the decision of the Constitutional Court of 20 September 2012.

3.2 He maintains that the failure of the cassation court to inform him of his right to legal aid and to provide a defence attorney during the cassation procedure violated his rights under article 14 (3) (d) of the Covenant, thus rendering the court decision of 21 January 2004 unlawful and unfair, and in violation of his rights under article 14 (5) of the Covenant.

State party's observations on the merits

4.1 In a note verbale dated 31 March 2015, the State party submits that on 20 March 2003 the author was convicted of murder and robbery and sentenced by the Supreme Court of the Republic of Khakassia to 18 years' imprisonment. On 21 January 2004, the criminal division of the Supreme Court of the Russian Federation confirmed the verdict on appeal. In accordance with article 51 (2) (5) of the Code of Criminal Procedure, the participation of a defence attorney is mandatory in criminal proceedings if an accused is charged with a crime punishable by more than 15 years' imprisonment, life imprisonment or the death penalty. The State party refers to the decision of the Constitutional Court of 8 February 2007 to clarify the question of the participation of a defence attorney in the cassation procedure. According to the interpretation provided by the Constitutional Court, the courts of general jurisdiction may apply its decision retroactively to judgments that have not become final and to final judgments not yet executed or partially executed. The State party submits that on 17 February 2011 the Supreme Court of the Russian Federation rejected the author's request for a supervisory review because his sentence had become final and had been executed before the Constitutional Court decision of 8 February 2007. It adds that as of 1 July 2002, the date of the entry into force of the Code of Criminal Procedure, the cassation court interpreted and applied article 51 (1) (1) in conjunction with article 50 (2) of the Code, which required the court to appoint a defender ex officio only if the defendant had requested it to do so. The lack of such request from the defendant was viewed, in the light of judicial practice, as a lack of expression of will by the defendant to have a defender participate in the cassation instance. The State party submits that the author had not requested a defender in the second instance court when he appealed his verdict, nor had his defence attorney in the first instance court expressed an intention to participate in the cassation procedure. It further maintains that the cassation hearing was conducted in the presence of the author and that he presented his position supporting the arguments developed in the cassation appeal. On 7 April 2011, the Head of the Supreme Court rejected the author's request for a review contained in the order of supervision of the Supreme Court decision of 17 February 2011. The State party submits that the author also applied to the Constitutional Court and was informed on 20 September 2012 that his application was not in compliance with the requirements of the Federal Constitutional Law No. 1 of 21 July 1994 on the Constitutional Court of the Russian Federation. The State party informs that the author submitted a civil claim against the Ministry of Finance of the Russian Federation for compensation of moral damage caused by the failure of the cassation court to provide him with a defence attorney at Abakan City Court. On 27 September 2011, the Court rejected the author's claim for compensation. This decision was not challenged and entered into force on 3 October 2011. The State party concludes that the cassation proceedings were conducted in compliance with the national law and that the author's disagreement with its outcome is not evidencing any violation of his rights under the Covenant.

4.2 In a note verbale dated 16 April 2015, the State party submits that the author had not invited a defender, had not requested to be represented by an ex officio defender and had not renounced legal assistance. It clarifies that, on 21 January 2004, the criminal division of the Supreme Court of the Russian Federation confirmed the verdict on appeal for the author while reducing the duration of the sentence of L, who was also convicted for the crime. It explains that the prosecutor participated in the cassation court hearing while the author and his defender were both absent. It admits a mistake in the decision of the cassation court of 21 January 2004 as it was the convicted co-defendant, L, who had participated in the cassation court hearing and not the author as indicated. Finally, the State party submits that the author did not raise a complaint that the cassation proceedings were not conducted in his presence in his appeals against the courts' decisions of 20 March 2003 and 21 January 2004.

Author's comments on the State party's observations on the merits and additional information

5.1 On 13 May 2015, the author submitted that he had not participated in the cassation hearing and that it was L, the convicted co-defendant in the case who had been present at that hearing. He clarifies that he applied to the Secretariat of the Constitutional Court[5] and claims that judges did not inform him about his rights. The author also contends that, at the time when his cassation appeal was rejected on 21 January 2004, according to the Code of Criminal Procedure, the participation of a defence attorney in criminal court proceedings was mandatory if the suspect or the accused had not renounced his or her right to legal assistance in writing, as established by article 52 of the Code.

5.2 On 26 May 2015, the author reiterated the arguments of his initial submission and his earlier comments. He notes that the Supreme Court of the Russian Federation did not explain his constitutional right to legal assistance at the cassation instance. The author underlines that, in its observations of 16 April 2015, the State party had accepted that he was not present at the cassation hearing as an uncontested fact.

5.3 On 25 August 2015, the author restated that he was not present at the cassation hearing and that he had not renounced his right to legal assistance. He provided a copy of his complaint of 22 July 2015 under the supervisory procedure and a copy of the Supreme Court letter of 3 August 2015 rejecting his complaint on the grounds that the same complaint had been already rejected on 17 February 2011, which was upheld by the Deputy President of the Supreme Court on 7 April 2015.

5.4 On 15 October 2015, the author claimed once again that the participation of a defence attorney could have affected the outcome of the cassation hearing in the author's favour. He alleges that if he had been represented, his defence attorney would have been able to prove that some evidence against him had been falsified.

5.5 On 17 October 2016, the author informed the Committee that on 29 August 2016 he had sent a letter-declaration to the President of the Russian Federation and provided a copy of the reply dated 6 September 2016 from members of the President's Administration reply.

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 93 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 takes note of the author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee considers that the author's allegations related to violations of his right to defence during the review in cassation of the verdict against him raise issues under article 14 (3) (d) and (5) of the Covenant, and have been sufficiently substantiated for purposes of admissibility. Accordingly, it declares these claims admissible and proceeds with its 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.

[5] The date of the author's application is not specified.

7.2 The Committee notes the author's allegation of a violation of his rights under article 14 (3) (d) of the Covenant during the review in cassation of his verdict. The Committee finds that article 14 (3) (d) of the Covenant, which provides the accused with a right to be tried in his or her presence, applies to the present case, as the court examined the case as to the facts and the law and made a new assessment of the issue of guilt or innocence.[6] The Committee recalls that under article 14 (3) (d) accused persons are entitled to be present during their trial and that proceedings in the absence of the accused may only be permissible if it is in the interest of the proper administration of justice, such as when accused persons decline to exercise their right to be present having been informed of the proceedings sufficiently in advance.[7] The Committee notes that the author, who was tried for the serious crimes of murder and robbery, was neither present nor represented by a defence attorney during the cassation court hearing. It further notes that the State party admitted that it made a mistake in the decision of the cassation court of 21 January 2014, as it was L, the other convicted in the case, who had participated in the cassation court hearing and not the author as indicated in the decision. The State party has failed to demonstrate that it has taken the steps necessary to inform the author of his rights to attend the proceedings in person and to be represented by a lawyer during the review in cassation of his verdict, especially since he was accused of serious crimes. In these circumstances, the Committee considers that the facts as presented reveal a violation of the author's rights under article 14 (3) (d) of the Covenant.

7.3 In the light of this conclusion, the Committee decides not to examine separately the author's claim under article 14 (5).

8. 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 article 14 (3) (d) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide individuals whose Covenant rights have been violated with an effective remedy in the form of full reparation. Accordingly, the State party is obligated, inter alia, to provide Igor Kostin with adequate compensation and review the court's verdict in compliance with the Covenant. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. 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 and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when 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 Russian in the State party.

[6] See communication No. 2041/2011, *Dorofeev v. Russian Federation*, Views adopted on 11 July 2014, para. 10.6.

[7] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 36.