United Nations CCPR/C/121/D/2168/2012

International Covenant on Civil and Political Rights

Distr.: General
21 December 2017

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2168/2012*, **

Communication submitted by:	Dmitry Koreshkov (represented by counsel, Leonid Sudalenko)
Alleged victim:	The author
State party:	Belarus
Date of communication:	12 May 2012 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 3 July 2012 (not issued in document form)
Date of adoption of Views:	9 November 2017
Subject matters:	Sanction for participating in a peaceful assembly; freedom of expression; right to an effective remedy
Procedural issues:	Exhaustion of domestic remedies; State party's failure to cooperate
Substantive issues:	Freedom of expression; freedom of assembly; right to an effective remedy
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 Dmitry Koreshkov, a national of Belarus born in 1976. He claims that the State party has violated his rights under articles 19 and 21, read in conjunction with article 2 (2) and (3) of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is represented by counsel.

* Adopted by the Committee at its 121st session (16 October–10 November 2017).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

GE.17-23050(E)

1723050

The facts as submitted by the author

2.1 In the autumn of 2011, citizens of Belarus attempted to organize peaceful gatherings in different cities. Participating citizens intended to protest against the social and economic situation in the country.

2.2 The author participated in one of the gatherings on 8 October 2011, which was held in the city of Gomel. The author was arrested by police officers during the gathering and accused of violating the Public Events Act.

2.3 On 28 November 2011, the Zheleznodorozhny District Court imposed a fine against him of 1.75 million Belarusian rubles[1] (50 base salary units) for a violation of article 23.34 (3)[2] of the administrative code. The court held that the author had participated in a mass event for which no prior permission had been obtained from local authorities.

2.4 On 29 November 2011, the author appealed the lower court's decision to the Gomel Regional Court, arguing that he had not participated in a mass event, but rather in an assembly of citizens, which was regulated by a different law on national and local assemblies.[3] As a result, he could not be held liable under article 23.34 of the administrative code. On 16 December 2011, the Gomel Regional Court rejected the author's appeal on the ground that article 23.34 also applied to assemblies. The court further stated that the author also had not met the requirements of the law on national and local assemblies, which states that an assembly must be initiated by at least 10 per cent of citizens permanently residing in the respective territory, and that those citizens must notify the authorities at least 15 days prior to the scheduled assembly. The author's supervisory review appeal to the Gomel Regional Court was rejected on 1 February 2012, and his appeal to the Supreme Court of Belarus was rejected on 3 April 2012, both on the ground that the author had admitted his participation in the gathering, which was conducted without prior approval from the local authorities. The author further claims that he did not file a supervisory review appeal with the Prosecutor General's Office because, in accordance with the Committee's established jurisprudence, such an appeal is not an effective domestic remedy.[4]

The complaint

3.1 The author submits that neither the arresting police officers nor the courts have established how the restriction on the author's right of freedom of expression falls within one of the justifications as prescribed by articles 19 (3) and 21 of the Covenant. In the absence of such justification, the author submits, his rights under articles 19 and 21 of the Covenant were violated.

3.2 The author further submits that, by ratifying the Covenant, the State party has undertaken obligations to "respect and ensure" all individual rights listed in the Covenant, as well as to provide any person whose rights and freedoms are violated with an effective remedy.

3.3 The author claims that, by arresting and fining him, and by not providing an effective remedy for the violations that occurred, the State party violated his rights of

[1] At that time, the amount was equal to approximately $200.

[2] Article 23.34 (3) of the administrative code states that a violation of the existing regulations on the organization and conduct of gatherings, street rallies, demonstrations, pickets and other mass events, as well as public calls for their organization and conduct, in the absence of corpus delicti in these actions, when committed by a participant in such events repeatedly within one year after being sentenced to an administrative fine for the same offence, carries a penalty of a fine of between 25 and 50 base units or administrative arrest.

[3] National and local assemblies are a form of citizens' direct participation in the administration of public affairs and are convened as deemed necessary to discuss issues relating to the State and society at the national or local level (art. 2). National assemblies are convened by the President of Belarus (art. 7). Local assemblies are convened as deemed necessary by local councils of deputies, executive and administrative bodies or territorial self-governing bodies. Local assemblies may also be convened at the initiative of at least 10 per cent of citizens permanently residing in the respective territory (art. 11).

[4] The author refers to communication No. 1838/2008, *Tulzhenkova v. Belarus*, Views adopted on 26 October 2011.

freedom of expression and peaceful assembly under articles 19 and 21, read in conjunction with article 2 (2) and (3) of the Covenant.

3.4 In a letter dated 14 July 2012, the author asks the Committee, in the event that the Committee concludes that a violation of the Covenant has taken place, to recommend that the State party bring its legislation on mass events into line with the international standards set out in the Covenant.

State party's observations on admissibility

4.1 In a note verbale dated 20 July 2012, and again on 4 January 2013, the State party submitted its observations on admissibility. In its observations, the State party argues that the author has not exhausted all available domestic remedies because he did not submit an appeal under the supervisory review proceedings to the Prosecutor General's Office. Moreover, after his supervisory appeal was rejected by the Deputy Chairman of the Supreme Court, he had the right to further submit another supervisory complaint to the Chairman of the Supreme Court, which he did not do. Thus, his complaint was registered in violation of article 2 of the Optional Protocol.

4.2 The State party further submits that it has discontinued the proceedings regarding the communication and will disassociate itself from any Views that might be adopted by the Committee on the communication.

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

5. In a letter dated 4 September 2012, the author commented on the observations of the State party. Referring to the Committee's jurisprudence, the author points out that an appeal to the Prosecutor General within the supervisory review proceedings does not constitute an effective remedy.[5] As for the right to submit his complaint to the Chairman of the Supreme Court, the author states that his original complaint was actually addressed to the Chairman of the Supreme Court, and that the fact that another judge of the Supreme Court reviewed his case instead shows the ineffectiveness of the supervisory review as a domestic remedy.

Issues and proceedings before the Committee

Lack of cooperation by the State party

6.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the author's communication, insofar as it was registered in violation of the provisions of the Optional Protocol, and that its authorities will "disassociate" themselves from any Views the Committee issues on the present communication.

6.2 The Committee observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1 of the Optional Protocol). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination, to forward its Views to the State party and to the individual concerned (art. 5 (1) and (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views.[6] It is up to the Committee to determine whether a case should be registered, and the Committee observes that, by declaring outright that it will not accept the Committee's determination of the admissibility and of the merits

[5] The author refers to communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009.

[6] See, for example, communications No. 1867/2009, No. 1936/2010, No. 1975/2010, Nos. 1977/2010–1981/2010 and No. 2010/2010, *Levinov v. Belarus*, Views adopted on 19 July 2012, para. 8.2; No. 2019/2010, *Poplavny v. Belarus*, Views adopted on 5 November 2015, para. 6.2; and No. 2139/2012, *Poplavny and Sudalenko v. Belarus*, Views adopted on 3 November 2016, para. 6.2.

of the communications, the State party is violating its obligations under article 1 of the Optional Protocol.

Consideration of admissibility

7.1 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.

7.2 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.

7.3 The Committee takes note of the State party's assertion that the author has failed to request the Chairman of the Supreme Court and the Prosecutor General's Office to initiate a supervisory review of the decisions of the domestic courts. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[7] It also considers that requests for supervisory review to the chairperson of a court directed against court decisions that have entered into force and that depend on the discretionary power of a judge constitute 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.[8] In the present case, the Committee notes that the State party has not provided any further observations following the rejection by the Deputy Chairman of the Supreme Court of the author's application for supervisory review. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.4 The Committee takes note of the author's submission that the State party violated its obligations under article 2 (2), read in conjunction with articles 19 and 21 of the Covenant. The Committee considers that the provisions of article 2 cannot be invoked in 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.[9] The Committee notes, however, that the author has already alleged a violation of his rights under articles 19 and 21, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider examination of whether the State party has also violated its general obligations under article 2 (2), read in conjunction with articles 19 and 21 of the Covenant, to be distinct from examination of the violation of the author's rights under articles 19 and 21 of the Covenant. The Committee therefore considers that the author's claims in that regard are incompatible with article 2 (2) of the Covenant and inadmissible under article 3 of the Optional Protocol.

7.5 The Committee considers that the author has sufficiently substantiated his claim under articles 19 and 21, read in conjunction with article 2 (3) of the Covenant, for purposes of admissibility. Accordingly, it declares this part of the communication admissible and proceeds with its consideration of the merits.

[7] See communications No. 1873/2009, *Alekseev v. Russian Federation*, Views adopted on 25 October 2013, para. 8.4; No. 1929/2010, *Lozenko v. Belarus*, Views adopted on 24 October 2014, para. 6.3; and No. 2016/2010, *Sudalenko v. Belarus*, Views adopted on 5 November 2015, para. 7.3.

[8] See communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.4; No. 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 8.3; Nos. 1919–1920/2009, *Protsko and Tolchin v. Belarus*, Views adopted on 1 November 2013, para. 6.5; No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; and No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2.

[9] See communications No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.4; and No. 2114/2011, *Sudalenko v. Belarus*, Views adopted on 22 Oct. 2014, para. 8.4.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that neither the arresting police officers nor the courts have established how the restriction on the author's 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 justification, his rights under article 19 of the Covenant were violated.

8.3 The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, and that such freedoms are essential for any society.[10] They constitute the foundation stone for every free and democratic society. The Committee recalls that article 19 (3) of the Covenant allows certain restrictions only as provided by law and only as necessary: (a) for the respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. Any restriction on the exercise of these freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. The Committee recalls[11] 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.[12]

8.4 The Committee notes that the author was sanctioned for participating in discussions of the social and economic situation in the country, based on the decision by the district court that the gathering had been held without prior authorization, in violation of the Public Events Act. It also notes that neither the State party nor the domestic courts have provided any explanations as to how such restrictions were justified pursuant to the conditions of necessity and proportionality set out in article 19 (3) of the Covenant, and whether the penalty imposed, i.e. an administrative fine, even if based on law, was necessary, proportionate and in compliance with any of the legitimate purposes listed in this provision. In the absence of any explanation by the State party, the Committee concludes that the rights of the author under article 19 (2), read in conjunction with article 2 (3) of the Covenant, have been violated.

8.5 The Committee also recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that 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 an assembly generally have the right to choose a location within sight and hearing distance of their target audience, and no restriction to this right is permissible unless it is: (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.[13]

[10] Para. 2.

[11] See, for example, communications No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 9.3; and No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para. 8.5.

[12] See, for example, communication No. 2092/2011, *Androsenko v. Belarus*, Views adopted on 30 March 2016, para.7.3.

[13] See *Poplavny v. Belarus*, para. 8.4; and *Poplavny and Sudalenko v. Belarus*, para. 8.5.

8.6 In the present case, the Committee must consider whether the restrictions imposed on the author's right to freedom of assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. The Committee notes that, in the light of the information available on file, the State party and the domestic courts have not provided any justification or explanation as to how, in practice, the peaceful gatherings would have violated the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others as set out in article 21 of the Covenant.[14]

8.7 The Committee notes that it has dealt with similar cases in respect of the same laws and practices of the State party in a number of earlier communications.[15] In line with these precedents, and in the absence of any explanation 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, read in conjunction with article 2 (3) of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 19 and 21, read in conjunction with article 2 (3) of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy in the form of full reparation. In the present case, the State party is under an obligation, inter alia, to provide the author with adequate compensation, including reimbursement for any legal costs or other fees incurred by him, and appropriate measures of satisfaction. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this connection, the Committee reiterates that the State party should review its legislation, in particular the Public Events Act of 30 December 1997, as it has been applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.[16]

11. 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 Belarusian and Russian in the State party.

---

[14] See *Poplavny and Sudalenko v. Belarus*, para. 8.6.

[15] See communications No. 2076/2011, *Derzhavtsev v. Belarus*, Views adopted on 29 October 2015; No. 2089/2011, *Korol v. Belarus*, Views adopted on 14 July 2016; and *Androsenko v. Belarus*.

[16] See, for example, *Vladimir Sekerko v. Belarus*, para. 11; communications No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013 and corrigendum, para. 9; No. 1790/2008, *Govsha et al. v. Belarus*, Views adopted on 27 July 2012, para. 11; mutatis mutandis, communication No. 1992/2010, *Sudalenko v. Belarus*, Views adopted on 27 March 2015, para. 10; *Poplavny v. Belarus*, para. 10; and *Poplavny and Sudalenko v. Belarus*, para. 10.