



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2815/2016*, **

<i>Communication submitted by:</i>	Y.Sh. (represented by counsel Sergey Poduzov)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	15 April 2016 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 92 decision, transmitted to the State party on 30 September 2016 (not issued in document form).
<i>Date of adoption of Decision:</i>	13 March 2020
<i>Subject matters:</i>	Lack of effective investigation of the killing of the author's daughter; lack of access to the investigation files.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims.
<i>Substantive issues:</i>	Right to life; interference with privacy and family life; access to information.
<i>Articles of the Covenant:</i>	2 (3), 6, 17 and 19 (2)
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author is Y.Sh., father of the deceased N.Sh. He claims that the Russian Federation violated his daughter's rights under article 6, read alone and in conjunction with article 2 (3) of the Covenant, and his rights under articles 17 and 19 (2) of the Covenant. The author is represented by counsel, Sergey Poduzov. The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

Facts as submitted by the author

2.1 On 1 March 2009, in the city of Novy Urengoy during a shoot-out between criminal groups, the author's daughter was accidentally shot in the chest. As a result of this injury, she died in the Central City hospital later that same day. The author submits that this incident was a direct result of the inability by the local authorities to control the criminal

* Adopted by the Committee at its 128th session (2–27 March 2020).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Dulkan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja and Gentian Zyberi.



groups active in the city. This fact was well known in 2009. The criminal activities continued well into 2010. He also claims that it took 10 minutes for the medical staff to admit his wounded daughter to the hospital, while according to the domestic regulations, they were supposed to act immediately in a case as grave as hers. He claims that the delay in treatment was one of the causes of her death.

2.2 On 1 March 2009, a criminal investigation was launched in relation to the death of Ms. Sh. On three occasions during 2009 and 2010, the investigation was suspended because of the impossibility of identifying a suspect, but was later resumed. After being resumed on 15 April 2010, the investigation was suspended on 20 February 2011 and has remained suspended ever since.

2.3 In December 2013, the author complained to the Novy Urengoy city court under article 125 of the Criminal Procedure Code for lack of action and the protraction of the investigation by the Novy Urengoy city investigative department. The author complained of not having been informed about the suspension of the investigation on 20 February 2011 and indicated a number of investigative actions that had not been undertaken. On 21 February 2014, the city court rejected his appeal. The court found that all the investigative actions possible in the absence of a suspect had been duly carried out and that the investigation had not been protracted. The court rejected the author's suggestions concerning the investigative actions, because a judge cannot dictate to the investigating authorities the actions to be undertaken.

2.4 On an unspecified date, the author appealed the decision of the Novy Urengoy city court to the Yamalo-Nenetsk Autonomous Region court. His appeal was rejected on 5 May 2014. On an unspecified date, the author submitted a cassation appeal to the same court. On 27 October 2014, a judge of the Yamalo-Nenetsk Autonomous Region court refused to transmit his cassation appeal for consideration by the court. The judge noted that the investigative authorities had not violated procedural requirements during the investigation and that their failure to notify the author about the suspension of the investigation on 20 February 2011 could not lead, in itself, to a finding of unlawfulness of the decision to suspend the investigation. The judge further held that the court could not impose its will concerning investigative actions and decisions on the investigative authorities. On an unspecified date, the author submitted a cassation appeal to the Supreme Court. On 20 March 2015, a judge of the Supreme Court refused to transmit his cassation appeal for consideration by the court.

2.5 On 9 April 2015, the author requested the Novy Urengoy city investigative department to provide to him with copies of all the forensic examinations regarding the death of his daughter, copies of all question sessions and interrogations, and copies of all searches and seizures in relation to the incident, in accordance with article 42 of the Criminal Procedure Code.

2.6 On 18 May 2015, the investigative department responded that the author had a right to study in person, or through a representative, the records of the investigative actions carried out with his participation, as well as to study the request for expert analysis and the expert reports, and to make copies of the documents on his personal electronic devices. On 9 July 2015, the author filed an appeal under article 125 of the Criminal Procedure Code to the Novy Urengoy city court against the decision of the investigative department. He argued that his ordinary place of residence was 3,000 kilometres away from the office of the investigative department, which made it impossible for him to personally study the case materials and make copies of the documents. He was also unable to hire a representative.

2.7 On 26 August 2015, the Novy Urengoy city court rejected the author's appeal. The court stated that under article 161 of the Criminal Procedure Code participants in judicial proceedings were prohibited from disclosing data on preliminary investigations. The Court found that since the author had not signed a non-disclosure agreement under article 310 of the Criminal Code, sending him the documents via regular post could disclose information concerning the investigation. The author filed an appeal to the Yamalo-Nenetsk Autonomous Region court on 18 October 2015, which was rejected on 25 November 2015. The court noted that the law on criminal procedure did not oblige the investigative authorities to send the information he had requested to the author by post and that their

refusal to send that information did not prevent the author from exercising his right to receive information in person or through a representative directly in the office of the investigative department.

The complaint

3.1 The author claims a violation by the State party of his daughter's rights under article 6 of the Covenant, read separately and in conjunction with article 2 (3), on several grounds. First, the State party had the means and opportunity to protect his daughter, but failed to do so. Second, the medical personnel in the State-owned hospital failed to react promptly enough when his daughter was brought to the hospital in an emergency after the incident. Third, the State party failed to carry out an effective investigation into the death of his daughter.

3.2 The author claims that the State party's refusal to provide him with information regarding the investigation prevented him from familiarizing himself with the investigation process and from knowing what had happened to his daughter. It thus constituted an interference with his private and family life in violation of article 17 of the Covenant. It also amounted to a violation of his right to receive information under article 19 (2).

3.3 Based on these arguments, the author asks for an effective investigation and for compensation for the violations he suffered.

State party's observations on admissibility

4.1 By note verbale of 8 December 2016, the State party submitted its observations on the admissibility of the communication stating that the author had failed to exhaust domestic remedies and that his claims were inadmissible under article 2 of the Optional Protocol.

4.2 The State party submits that under article 401 (2) of the Criminal Procedure Code, the author could submit a cassation appeal to the Supreme Court. The author did not use this remedy and had not appealed the decision of the Novy Urengoy city court of 26 August 2015.

4.3 Under article 401 (3) of the Criminal Procedure Code, the author could appeal to the President or Deputy President of the Supreme Court the decision of the Supreme Court judge, dated 20 March 2015, not to transmit his cassation appeal for consideration by the court. The author has failed to do so and thus has not exhausted the domestic remedies available to him.

4.4 The State party further submits that the refusal of the investigative authorities to send investigation documents by post, as requested, does not constitute an interference with the author's right to privacy and family life, neither does it violate his freedom of expression. The author's respective claims are incompatible with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol. In addition to this, the author has not brought these claims before the domestic courts and has thus failed to exhaust domestic remedies, as required under article 2 of the Optional Protocol.

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

5.1 On 27 February 2017, the author submitted his comments to the State party's observations on admissibility. He submits that the cassation appeal under articles 401 (2) and 401 (3) of the Criminal Procedure Code is not an effective remedy to be exhausted before submitting a complaint to the Committee. He refers to the judgment of the European Court for Human Rights in the case of *Kashlan v. Russian Federation*, in which the Court found the cassation appeal not to be an effective remedy.¹ He also relies on his own experience in his complaint concerning the lack of an effective investigation, whereby he brought a cassation appeal to the Supreme Court and received a refusal from a Supreme Court judge to transmit his appeal for consideration by the Court. He claims that even if the

¹ European Court of Human Rights, application No. 60189/15.

cassation appeal were to be considered by the Court, the latter does not review the decisions of lower courts on the merits.

5.2 The author further submits that his rights to privacy and family life under article 17 and the right to receive information under article 19 (2) of the Covenant were raised in his request for information to the investigative department and later in the courts and therefore he did substantiate his claims and exhaust domestic remedies on these claims.

State party's observations on the merits

6.1 On 18 April 2017, the State party submitted its observations on the merits of the communication. According to the State party, the author's daughter was wounded in a shoot-out connected to the division of areas of influence by criminal groups when she was driving in a car with two men, B. and M., who were involved with an ethnic criminal group. She died in hospital the same night as a result of her wounds.

6.2 A criminal investigation of the incident uncovered 30 bullet holes in the rear of the car. The bullets taken from the body of the author's daughter were analysed and recorded at the criminal expert centre of the Ministry of the Interior. Forensic examination of the body of Ms. Sh. was carried out. Explosive technical tests and ballistic, traceological, forensic, dactyloscopic, biological and genetic tests were also carried out. The investigation studied video recordings from surveillance cameras in a cafe attended by the author's daughter, B. and M. before the incident. A large number of searches took place, leading to the seizure of firearms, ammunition and one F1 grenade.

6.3 During the investigation, some 90 persons were questioned and six apartment buildings in the surrounding area were searched. Witnesses were identified. Owners of cars similar to the car in the incident were questioned and their possible connection to the crime was checked. More than 20 instructions for investigative actions were sent by the investigative authorities to the Novy Urengoy police department. Information from telephone providers about all the subscribers present at the crime location were obtained and studied. Other investigative actions were also carried out. The author received the status of a victim in the case.

6.4 However, those responsible for the crime were not identified. On 20 February 2011, after all the investigative actions possible in the absence of a suspect had been carried out, the investigative department in Novy Urengoy decided to suspend the investigation. That decision was reviewed by the courts. The author requested the courts to order a number of investigative actions to be carried out, but his cassation appeals were rejected. In such circumstances, there are currently no grounds for a prosecutorial response. The decision to suspend the investigation of 20 February 2011 can be revisited if significant new information is obtained. That is particularly the case, as the investigation has not been closed (but merely suspended) and a number of investigative actions are still being taken in order to identify the suspects. The supervision of the investigation is being undertaken by a supervising prosecutor.

6.5 The State party reiterates the fact that the author has not submitted a cassation appeal in connection with the refusal to send him the investigation files. It concludes by stating that there has been no violation of the author's rights in the present communication.

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

7.1 On 5 June 2017, the author submitted his comments on the merits. He notes that the State party's observations concern only his claims under article 6 alone, and read in conjunction with article 2 (3), of the Covenant and he disagrees with the State party's conclusion that there has been no violation of his rights.

7.2 The author reiterates his claim under article 6 of the Covenant that the State party had the necessary means to prevent the death of his daughter by creating a secure environment in the city and protecting all citizens from criminal gangs, which it failed to do. He also claims that an investigation that lasted 24 months from March 2009 to February 2011 and ended with no result cannot be considered effective. He alleges that if it were not

for his requests to the prosecutor's office, the investigative authorities and the court, many investigative actions would not have taken place.

7.3 The author notes that the State party has not presented observations regarding his claims under articles 17 and 19 (2) of the Covenant and reiterates his claims under these articles.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

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

8.3 The Committee notes the State party's claim that the author has failed to exhaust domestic remedies regarding his claims under article 6, read in conjunction with article 2 (3), of the Covenant concerning the effectiveness of the investigation into his daughter's killing, because he did not submit an appeal against the decision of a Supreme Court judge, dated 20 March 2015, to the President or Deputy President of the Supreme Court. According to the State party, the author has also failed to exhaust domestic remedies regarding his request to provide him with the investigation files, because he has not submitted a cassation appeal. The Committee also notes the author's claims that cassation appeal proceedings are not considered as domestic remedies to be exhausted for the purpose of admissibility.

8.4 The Committee notes that the cassation review procedure set out under article 401.2 of the Criminal Procedure Code concerns the revision, on points of law only, of court decisions that have entered into force. The decision on whether to refer a case for a hearing before the cassation court is discretionary in nature and is made by one single judge. That leads the Committee to believe that the cassation review contains elements of an extraordinary remedy. The State party must therefore show that there is a reasonable prospect that such a procedure would provide an effective remedy in the circumstances of the case.² In the absence of any clarification from the State party on the effectiveness of the cassation review procedure in cases similar to the present one, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol for purposes of admissibility from examining the author's claims under article 6, read in conjunction with article 2 (3), and article 19 (2) of the Covenant.

8.5 The Committee notes the author's claim that the State party violated his daughter's rights when it failed to provide a general situation of safety in the city and prevent her killing. The Committee refers to its general comment No. 36 (2018) on the right to life and notes that States parties have an obligation to respect the right to life. Not only do they have a duty to refrain from engaging in conduct resulting in arbitrary deprivation of life by State representatives, but they must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State. However, the Committee notes that this provision cannot be expected to impose an impossible or disproportionate burden on the authorities. Thus, the positive obligation of a State party to prevent deprivation of life by an individual, beyond adopting necessary criminal law provisions, can only be expected in "reasonably foreseeable threats and life-threatening situations that can result in loss of life" (para. 7). In the present case, the Committee notes that the author does not claim that the authorities had in their possession specific information about a planned shooting, which accidentally caused the death of the author's daughter; nor has the author shown that the level of lawlessness and violence in the city reached such high levels as to put all the inhabitants at

² See, for example, *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3, and *Dorofeev v. the Russian Federation* (CCPR/C/111/D/2041/2011), para 9.6.

real risk to their lives. In that light, the Committee finds the author's claims under article 6 unsubstantiated and inadmissible under article 2 of the Optional Protocol.

8.6 The Committee also notes the author's claim that the staff of the city hospital violated article 6 of the Covenant by not acting with due urgency in admitting his daughter to the hospital. The Committee observes that the author has not presented sufficient details on this part of his claim and finds it insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.7 The Committee notes the author's claim that the investigation of his daughter's death was ineffective and violated her rights under article 6, read in conjunction with article 2 (3), of the Covenant. The Committee further notes that the investigation was opened on the day of the incident, 1 March 2009, and that numerous investigative actions had been undertaken before the decision to suspend the investigation in the absence of a suspect was finally made on 20 February 2011. The Committee notes that the author was recognized as a victim in the case and that he participated in the investigation. The Committee also notes that the author's claim that the investigation was ineffective was reviewed by the courts and that the courts found that all procedural actions possible in the absence of a suspect had been carried out. The Committee recalls that it is generally for a State party's authorities and courts to evaluate the facts and the evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.³ In the present case, the Committee observes that the information before it does not allow it to conclude that the investigation was exceptionally protracted or lacked transparency, independence or impartiality. The Committee therefore declares this part of the communication insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.8 The Committee notes the author's claim that by refusing to send him the investigation files, the State party deprived him of information about the investigation of his daughter's killing, which constituted an interference with his family and privacy and violated article 17 of the Covenant. In the absence of further pertinent information on file to explain the link between the facts of the investigation and the legal interests protected by article 17, the Committee finds this claim insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

8.9 In relation to the author's claim under article 19 (2) of the Covenant, the Committee notes the State party's observation that it falls outside the scope of the Covenant. The Committee notes, however, that the author invokes article 19 (2) in connection to his right to receive information, which is protected by the Covenant. However, the Committee notes that the refusal of the investigative authorities to send the files to the author was accompanied by the information that he could make electronic copies of the files in person or through a representative. The author responded that he lived 3,000 km away and was not able to come in person, nor was he able to appoint a representative. In that connection, the Committee notes that the author did not provide reasons as to why he could not appoint a representative. Taking into account that the right of access to the investigation files was not denied to the author, but subject to what appear to be reasonable limitations, the Committee considers that the author's claim under article 19 (2) is insufficiently substantiated for the purposes of admissibility and is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides that:

- (a) The communication is inadmissible under article 2 of the Optional Protocol;
- (b) The decision be transmitted to the State party and to the author.

³ See for example, *Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 8.10.