



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. 2456/2014*, **

<i>Communication submitted by:</i>	Erzhan Sadykov (represented by counsel, Bakhytzhan Toregozhina)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	6 May 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 3 September 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	23 July 2020
<i>Subject matter:</i>	Sanctioning of the author for distributing invitations to a peaceful assembly and for expressing his opinion; unfair trial
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of assembly; freedom of expression; fair trial
<i>Articles of the Covenant:</i>	14 (3) (d) and (g), 19 and 21
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is Erzhan Sadykov, a national of Kazakhstan born in 1960. He claims that the State party has violated his rights under articles 14 (3) (d) and (g), 19 and 21 of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel.

* Adopted by the Committee at its 129th session (29 June–24 July 2020).

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



The facts as submitted by the author

2.1 On 5 September 2013 at around 6 p.m., the author, unemployed and with no permanent place of residence, was apprehended by the police when he was transporting, in the boot of his car, over 2,000 leaflet invitations to a meeting of homeless people, scheduled for 9 September 2013. The police detained the author, seized the leaflets and filed an administrative record for violating the law on organization and carrying out of peaceful assemblies. The author's request for a lawyer was denied. He remained in detention until 6 September 2013, and claims to have been ill-treated during this period. He was not given any food and was provided with water sporadically. On 6 September 2013, the Almaty City Specialized Interregional Administrative Court found him guilty under article 373 (3) of the Code of Administrative Offences, for having breached the legislation on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations repeatedly. The Court found that the author was the organizer of an unauthorized meeting and sentenced him to 15 days of administrative arrest starting on 6 September 2013.

2.2 On an unspecified date, the author appealed to the Almaty City Court. He claimed that the leaflets had been put in his car by his acquaintances, that he was not an organizer of the event and that he had never been involved in similar activities before.

2.3 On 10 September 2013, the Almaty City Court maintained the decision of the court of first instance and established that the author was distributing leaflets and inviting people to attend a picket to take place on 9 September 2013. The Court referred to the Law of 17 March 1995 on the procedure for the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations, obliging all organizers of public events to seek the prior authorization of the local executive authorities, which had not been done in the author's case. The Court found that 15 days' administrative arrest imposed on the author was within the limits of the sanctions set out in article 373 (3) of the Code of Administrative Offences.

2.4 On 26 September 2013, the author requested the Almaty City Prosecutor's office to initiate a supervisory review of the decision of the Specialized Interregional Administrative Court. He claimed, *inter alia*, that his detention period should have been calculated from the moment of apprehension – that is, as of 5 September 2013 and not 6 September 2013 as decided by the Court. He also argued that from 5 to 6 September 2013, he was detained in inhumane conditions and did not receive food, which forced him to accept a trial without legal counsel. In addition, he remained unrepresented during the trial. The author emphasized that he was not the organizer of the planned meeting, but he was supporting the position of the actual organizers. He invoked articles 19 and 21 of the Covenant, arguing that his freedom of opinion cannot be limited, and that his intention to participate in peaceful meetings cannot be a ground for finding him guilty of an administrative offence and imposing sanctions on him. On 7 October 2013, the city Prosecutor rejected the author's request for a supervisory review, noting that no grounds for revision of the courts' decisions had been found.

2.5 On 23 October 2013, the author appealed for a supervisory review to the Prosecutor General. On 14 March 2014, the Deputy Prosecutor General, with reference to the appraisal of evidence adduced during the court proceedings, rejected the author's appeal and stated that no grounds for revision of the courts' decisions had been found.

The complaint

3.1 The author claims that by sentencing him to administrative arrest for his intention to participate in a planned assembly which had not yet taken place, the State party violated his rights to freedom of expression and of peaceful assembly under articles 19 (2) and 21 of the Covenant. He adds that the State party has failed to provide any justification as to why it was necessary to restrict his rights.

3.2 The author further claims a violation of article 14 of the Covenant since the courts failed to apply directly the provisions of the Covenant. He claims that despite his request,

he was not provided with a lawyer when he was apprehended, in violation of article 14 (3) (d) of the Covenant, and that he was forced to confess guilt,¹ in violation of article 14 (3) (g) of the Covenant. He further claims that the courts erred in applying article 373 (3) of the Code of Administrative Offences and in ordering his arrest for 15 days. In addition, he was detained for one day longer than he should have been under the law.

3.3 The author requests that those responsible for the violation of his rights be brought to justice, and he seeks compensation for the moral damage suffered. He asks the Committee to request that the State party adopt measures to eliminate the existing limitations to the right to peaceful assembly and to freedom of expression in its legislation; and to also adopt measures to eliminate violations of the right to a fair trial under article 14 (3) (d) and (g) of the Covenant. He also asks the Committee to urge the State party to guarantee that peaceful protests are not followed by unjustified interference by the State authorities and the prosecution of participants.

State party's observations on admissibility and the merits

4.1 In notes verbales dated 27 October 2014 and 25 March 2015, the State party submitted its observations, claiming that the author had not requested the Prosecutor General to submit a protest for a supervisory review in his case to the Supreme Court and that he had thus failed to exhaust all domestic remedies.

4.2 The State party submits that on 5 September 2013, at the crossing of Ryimbek St. with Otegen St. in Almaty city, law enforcement forces conducted a special operation linked to unsanctioned meetings and apprehended the author who was transporting 2,516 leaflet invitations issued by several non-governmental organizations to a national meeting of homeless people, scheduled for 9 September 2013 in Almaty.

4.3 The State party adds that on 5 September 2013, the Department for Internal Affairs of Auezov in the district of Almaty received a written complaint from a citizen, Mr. S., requesting the authorities to take actions against the author who was campaigning and appealing for his participation in the event. The State party notes that the facts contained in the complaint of Mr. S. were confirmed by the probe conducted. The author, therefore, as a member of a non-governmental organization, was participating in an unsanctioned event by distributing leaflets and invitations. In this context, on 6 September 2013, the Specialized Interregional Administrative Court found him guilty of a violation of article 373 (3) of the Code of Administrative Offences, and sentenced him to 15 days of administrative arrest. This decision was also upheld by the Almaty City Court on 10 September 2013. The author's complaint under the supervisory review procedure was also dismissed on 14 March 2014.

4.4 The State party denies that the author's rights to freedom of peaceful assembly or freedom of expression were violated. It contends that the provisions of articles 19 and 21 of the Covenant are fully reflected in the domestic legislation of Kazakhstan. The right to peaceful assembly, as guaranteed by article 32 of the Constitution, can only be restricted by the law, in the interests of national security, public order, the protection of public health or the rights and freedoms of others. At the same time, the Law on the procedure for the organization and conduct of peaceful assemblies, meetings, marches, pickets and demonstrations establishes certain restrictions on this right. Article 2 of the Law states that peaceful assemblies can be held only with the prior authorization of the local municipalities, whereas article 9 establishes liability for the breach of the procedure for organizing and holding of an event. In the author's case, the courts established that no authorization had been obtained by the author prior to the event of 9 September 2013. The State party adds that the statement of Mr. S. also confirms the fact that the purpose of transportation and distribution of leaflets was to organize the meeting, and therefore this was rightly qualified under article 373 (3) of the Code of Administrative Offences.

4.5 With respect to the author's claim that he was not provided with a lawyer, the State refers to the provisions of the Code of Administrative Offences. The State submits that this

¹ No further details provided.

case does not require compulsory legal assistance, and that the author did not request it. In addition, the author refused legal assistance in writing during the court proceedings.

4.6 The State party rejects the author's claims of ill-treatment during the administrative proceedings. It notes that he never complained to the respective authorities in this regard, and he did not raise these claims during the court proceedings. The State party adds in this context that the author confessed guilt in committing an administrative offence, but he disagreed in relation to its exact qualification and his subsequent arrest.

4.7 As for the argument that the administrative arrest was one day longer than it should have been under the law, the State party submits that this issue was raised and assessed during the judicial proceedings and was subsequently dismissed. On 5 September 2014, the author was not technically under administrative arrest; rather, he was undergoing a number of investigative proceedings following the complaint received from Mr. S.

4.8 The State party notes that the Covenant allows for certain restrictions to the right of peaceful assembly. In many democratic countries, the freedom of peaceful assembly is restricted by special laws that lay out the conditions in which such assemblies may take place, and in many countries such laws are much stricter than in Kazakhstan. For example, in France, the authorities can disperse crowds after two warnings, and if the demonstration continues, its organizers can be imprisoned for up to six months. To conduct a rally in New York in the United States of America, one has to submit an application 45 days prior to the event, showing the exact route the participants intend to take, and in cases where such an application is not made, rally participants can be arrested. In the United Kingdom of Great Britain and Northern Ireland, street demonstrations and rallies can be conducted only after receiving official approval from the police. In Germany, any mass event must be authorized by the authorities. Therefore, the State party submits that its regulation of public assemblies is in line with the norms of international law, the Covenant and existing practices in other democratically developed countries.

4.9 The State party underlines that the author was subjected to administrative arrest not because of his views, but for having breached the procedure governing the organization of peaceful assemblies, as established under the law.

4.10 The State party concludes that the author's claims under articles 14, 19 and 21 of the Covenant are unsubstantiated.

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

5.1 On 31 January and 16 October 2015, the author provided comments to the State party's observations. He notes that the State party has restricted his rights to freedom of assembly and freedom of expression, but it has failed to demonstrate that the restriction in question was justified and necessary. The State party could not explain whether the restriction to hold a peaceful assembly was necessary in the interests of national security or public safety in order to protect public health, morals or the rights and freedoms of others. The author and organizers intended to hold a meeting between a number of homeless people and the Almaty authorities. This intention was also widely disseminated on social media. The organizer issued leaflets for those who did not have access to the Internet and requested the author to deliver them to a certain location using his vehicle.

5.2 The author reiterates his claims that the authorities failed to justify why it was necessary to restrict his freedoms by imposing 15 days of administrative arrest, which was disproportionate in a democratic society since his only intention was to assist the organizers in arranging a peaceful meeting. He reiterates that his right to a fair trial was violated, noting that the courts failed to establish that his detention had been one day longer than it should have been under the law; that he had been ill-treated; and that, despite his request, he had not been provided with a lawyer when he was apprehended.

5.3 The author refers to the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association in connection to his visit to Kazakhstan in January 2015, criticizing the restrictive approach to freedom of assembly in the country.² He also

² A/HRC/29/25/Add.2.

refers to the *Guidelines on Freedom of Peaceful Assembly*,³ developed in 2007 by the Organization for Security and Cooperation in Europe, and notes the commitment of the State party to follow these guidelines. He submits that, although article 10 of the Law on the procedure for the organization and conduct of peaceful assemblies, meetings, marches, pickets and demonstrations allows local authorities to regulate the procedure of a peaceful assembly, it does not grant them the power to determine permanent places where assemblies are to take place, and especially to limit them to just one location. In this context, he adds that any restriction imposed to freedom of assembly should be proportional, and their application should not be automatic and reviewed according to every single concrete event, taking into account surrounding circumstances.

5.4 With regard to the State party's argument that he failed to exhaust all domestic remedies, the author argues that a request for a supervisory review submitted to the Prosecutor General does not constitute an effective domestic remedy. He notes that he submitted such requests to the Prosecutor's Office of Almaty and to the Prosecutor General's Office, both of which were rejected.

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 that the State party challenges the admissibility of the communication, because according to the State party, the author has failed to file a petition for supervisory review to the Prosecutor General against the court decisions in the case. The Committee notes that on 23 October 2013, the author petitioned the Prosecutor General's Office for a supervisory review of his administrative case. The request was rejected, however, by the Deputy Prosecutor General on 14 March 2014. The Committee further 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.⁴ Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee notes the author's claim that his rights under article 14 of the Covenant have been violated because the domestic courts did not take into account his claims under articles 19 and 21 of the Covenant. In the absence of any other pertinent information in that respect on file, however, the Committee considers that the author has failed to sufficiently substantiate that claim for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The author further claims that his rights under article 14 (3) (d) of the Covenant have been violated because he did not have access to a lawyer when he was arrested on 5 September 2013, and that his right to defence was violated.

6.6 In this context, the Committee notes that the author was accused of an administrative offence, while article 14 (3) (d) provides guarantees in cases regarding the determination of criminal charges against individuals. The Committee, however, recalls that although criminal charges relate in principle to acts declared to be punishable under domestic criminal law, the concept of a "criminal charge" has to be understood within the meaning of

³ Available at <https://www.osce.org/odihr/73405>.

⁴ See, for example, *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3; *Poplavny and Sudalenko v. Belarus* (CCPR/C/118/D/2139/2012), para. 7.3.

the Covenant.⁵ According to paragraph 15 of the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the notion may also extend to sanctions that, regardless of their qualification under domestic law, must be regarded as penal in nature because of their purpose, character or severity. In the present cases, the author was apprehended, brought to trial, found guilty and sanctioned with 15 days of administrative arrest for dissemination of invitations for a public event. The Committee also notes that the author was subjected to one additional day of deprivation of liberty for investigative purposes. In these circumstances, the Committee concludes that the author's claim falls under the protection of article 14 (3) (d) of the Covenant.

6.7 The Committee notes the author's claim that his detention lasted for one day longer than foreseen by the law. The Committee also notes the State party's observation that this issue was raised and assessed during the judicial proceedings and was subsequently dismissed. The Committee notes that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality. The Committee further notes that the author has not provided any details to substantiate that his detention for one additional day was clearly arbitrary or amounted to a manifest error. Accordingly it finds this part of the communication to be unsubstantiated and inadmissible under article 2 of the Optional Protocol.

6.8 The Committee notes the State party's observation that this case does not require compulsory legal assistance and that the author did not request to have such assistance and refused it in writing during the court proceedings. The Committee notes, in this regard, that the author has not provided any details or documents to substantiate his claim that he was denied a lawyer in connection with the proceedings against him and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

6.9 The Committee further notes the author's claim that he was forced to confess guilt in his administrative case of distribution of leaflets about the organization of a peaceful assembly regarding homeless people, in violation of article 14 (3) (g) of the Covenant. The Committee refers to the State party's observation that the author confessed his guilt and notes that the author has not provided any information or explanations in support of his claims. Accordingly, it finds this part of the communication to be unsubstantiated and inadmissible under article 2 of the Optional Protocol.

6.10 The Committee considers that the author has sufficiently substantiated his remaining claims under articles 19 (2) and 21 of the Covenant for the purposes of admissibility. It therefore declares them admissible and proceeds with its examination of the merits.

Considerations of the merits

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

7.2 The Committee notes the author's claim that his right to impart information under article 19 (2) of the Covenant was violated because on 5 September 2013, he was arrested and subsequently tried and sanctioned for distributing invitations to a public meeting of homeless people, which was scheduled for 9 September 2013. The Committee must therefore decide whether the limitations imposed on the author are allowed under one of the permissible restrictions laid out in article 19 (3) of the Covenant.

7.3 The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. Those freedoms are

⁵ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 15; *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), para. 7.3; and *Zhagiparov v. Kazakhstan* (CPR/C/124/D/2441/2014), para. 13.7.

essential for any society and constitute the foundation stone for every free and democratic society.⁶ All restrictions imposed on freedom of expression must conform to the strict tests of necessity and proportionality, 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.⁷

7.4 The Committee notes the State party's argument that the national legislation is fully in line with the provisions of article 19 (3) of the Covenant and is aimed at regulating and not restricting freedom of expression. The Committee observes, however, that no explanation has been provided by the State party to justify the restriction and verify whether the author's actions were endangering the rights or reputation of others, national security or public order (*ordre public*), or public health or morals in the light of article 19 (3) of the Covenant. In the absence of any such explanation, the Committee finds that sanctioning the author with a sentence entailing deprivation of liberty for 15 days for distributing invitations to a peaceful public event, albeit unauthorized, was not a necessary and proportionate measure pursuant to the conditions set out in article 19 (3) of the Covenant.⁸ It therefore concludes that the author's rights under article 19 (2) of the Covenant have been violated.

7.5 The author also claims a violation of his rights under article 21 of the Covenant. The Committee recalls that the right of peaceful assembly is a fundamental human right essential for the public expression of an individual's views and opinions and indispensable in a democratic society.⁹ That right entails the possibility of organizing and participating in a peaceful assembly in a publicly accessible location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to that 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 (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right of peaceful 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.¹⁰ The State party is thus under an obligation to justify any limitation of the right protected by article 21 of the Covenant and to demonstrate that it does not pose a disproportionate obstacle to the exercise of that right.¹¹

7.6 The Committee observes that authorization regimes, where those wishing to assemble have to apply for permission (or a permit) from the authorities to do so, undercut the idea that peaceful assembly is a basic right.¹² Where such requirements persist, they must in practice function as a system of notification, with authorization being granted as a matter of course, in the absence of compelling reasons to do otherwise. Such systems should also not be overly bureaucratic.¹³ Notification regimes, for their part, must not in practice function as authorization systems.¹⁴

7.7 The Committee observes that the State party relied only on the provisions of the law on public events, which requires permission from the local authorities for a peaceful assembly, thereby restricting the right of peaceful assembly. The State party has not

⁶ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

⁷ *Ibid.*, para. 22.

⁸ See, for example, *Pivonos v. Belarus* (CCPR/C/106/D/1830/2008), para. 9.3; *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3; and *Toregozhina v. Kazakhstan* (CCPR/C/124/D/2257/2013-CCPR/C/124/D/2334/2014), para. 7.5; and Human Rights Committee, general comment No. 34, para. 34.

⁹ See, for example, *Korol v. Belarus* (CCPR/C/117/D/2089/2011), para. 7.5.

¹⁰ *Ibid.*; see also *Toregozhina v. Kazakhstan*, para. 7.3.

¹¹ See *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.

¹² CCPR/C/MAR/CO/6, para. 45; CCPR/C/GMB/CO/2, para. 41; and African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para. 71.

¹³ *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 8.3.

¹⁴ CCPR/C/JOR/CO/5, para. 32.

attempted to demonstrate that the apprehension and trial of and imposition of a sanction on the author, entailing deprivation of liberty, for the organization of a peaceful assembly was necessary in a democratic society and proportionate to the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others, as required under article 21 of the Covenant. In these circumstances, and in the absence of any other information or explanation of pertinence, the Committee concludes that the State party has violated the author's rights under article 21 of the Covenant.

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 articles 19 (2) and 21 of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. That 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 provide the author with adequate compensation, including reimbursement for the legal costs incurred. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In that connection, the Committee reiterates that the State party should review its legislation with a view to ensuring that the rights under articles 19 and 21 of the Covenant, including the right to organize and conduct peaceful (including spontaneous) assemblies, meetings, processions, pickets and demonstrations, are fully enjoyed in the State party.

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 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 the official languages of the State party.
