



# 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. 3242/2018\*, \*\*

<i>Communication submitted by:</i>	Natalya Shchukina (represented by counsel, Leonid Sudalenko)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communications:</i>	13 May 2017 (initial submissions)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 12 September 2018 (not issued in document form)
<i>Date of adoption of Views:</i>	24 March 2022
<i>Subject matter:</i>	Imposition of a fine for participating in unsanctioned peaceful meeting; freedom of expression
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of assembly; freedom of expression
<i>Articles of the Covenant:</i>	2 (2) and (3), 9, 19 and 21
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is Natalya Shchukina, a Belarussian national born in 1944. She claims that the State party has violated her rights under articles 9, 19 and 21, read in conjunction with articles 2 (2) and (3) of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. She is represented by counsel.<sup>1</sup>

#### Facts as submitted by the author

2.1 The author is a retiree who actively follows public and political developments in the country. In March 2017, she was brought before court, charged with significant

\* Adopted by the Committee at its 134th session (28 February–25 March 2022).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

<sup>1</sup> The author has been represented by counsel since the State party's submission on admissibility and the merits.



administrative fines for participating in peaceful rallies and convicted for violating the provisions of the Law on Mass Events concerning the organization of a meeting, thereby committing an administrative offence under article 23.34 (1) of the Code of Administrative Offences in relation to two separate incidents.

2.2 In the first incident on 12 March 2017, the author participated in a street rally and a demonstration to protest against the presidential decree “On prevention of social dependency”, which was held in the city of Rogachev in Gomel region without prior authorization by the competent authorities. This peaceful event was conducted in the presence, but without the interference, of police officers. However, the author was subsequently summoned to the Department of Internal Affairs of the Sovietskiy District in Gomel, where a police record was filed against her for violating article 23.34 (1) of the Code of Administrative Offences.

2.3 On 23 March 2017, the Sovetskiy District Court established that the author had violated the provisions of the Law on Mass Events by participating in an unauthorized meeting, thereby committing an administrative offence under article 23.34 (1) of the Code of Administrative Offences. Consequently, the Sovetskiy District Court ordered the author to pay a fine of 230 Belarusian roubles (Rbl).<sup>2</sup> She appealed this decision to the Gomel Regional Court, which upheld the decision of the court of first instance. On 26 April 2017, the decision of the Sovetskiy District Court entered into force.

2.4 In the second incident on 25 March 2017, the author participated in another unauthorized peaceful street rally in Gomel to protest against the above-mentioned presidential decree. After the event, police officers arrested the author and filed an administrative record for violation of article 23.34 (1) of the Code of Administrative Offences. The author submits that she was detained in the temporary detention facilities of the Department of Internal Affairs of the Gomel Regional Executive Committee for 44 hours.

2.5 On 27 March 2017, the Sovetskiy District Court concluded that the author’s actions violated the provisions of the Law on Mass Events concerning the organization of a meeting, thereby committing an administrative offence under article 23.34 (1) of the Code of Administrative Offences and fined her to Rbl276.<sup>3</sup>

2.6 On 3 April 2017, the author appealed the decision to the Gomel Regional Court; the appeal was dismissed on 21 April 2017.

2.7 The author submits that she has exhausted domestic remedies, since in line with the Committee’s jurisprudence, supervisory review procedures against court decisions which have entered into force do not constitute a remedy, which has to be exhausted for purposes of article 5 (2) (b) of the Optional Protocol.<sup>4</sup>

## **Complaint**

3.1 The author claims a violation of her rights under articles 19 and 21, read in conjunction with articles 2 (2) and 2 (3) of the Covenant, on the grounds that the authorities failed to explain why the restrictions imposed on her right to hold peaceful rallies were necessary in the interests of national security or public safety, public order, the protection of public health, morals or the rights and freedoms of others, as required under article 19 (3) and the second line of article 21 of the Covenant. She therefore considers the restrictions and sanctions imposed on her unlawful and disproportionate.

3.2 The domestic authorities wrongly considered that article 23.24 of the Code of Administrative Offences superseded the Covenant because article 27 of the Vienna Convention on the law of treaties provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. In addition, the domestic courts acted in breach of article 59 of the Constitution that binds them to take the measures necessary to protect individual rights and freedoms.

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<sup>2</sup> At the time of the administrative hearing, this was approximately \$121.

<sup>3</sup> At the time of the administrative hearing, this was approximately \$146.

<sup>4</sup> Reference is made to *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3.

3.3 The author claims that she was unlawfully detained for 44 hours while exercising her rights under articles 19 and 21 of the Covenant, in violation of her rights under article 9 of the Covenant.<sup>5</sup>

#### **State party's observations on admissibility**

4.1 By note verbale of 12 November 2018, the State party submitted its observations on the admissibility and merits of the complaint and noted that on 12 and 25 March 2017, the author participated in unauthorized rallies and was convicted by the Sovetskiy District Court for violating the provisions of the Law on Mass Events concerning the organization of meetings, thereby committing an administrative offence under article 23.34 (1) of the Code of Administrative Offences. The District Court appraised the author's actions and lawfully imposed fines upon her. The rulings of the first instance court were upheld on appeal by the Gomel Regional Court on 21 and 26 April 2017. The State party submits that the author did not appeal the decisions of Gomel Regional Court with the Prosecutor General or the Chair of the Supreme Court under supervisory review procedures and therefore failed to exhaust all available domestic remedies. In that context, the State party concludes that the author submitted the communication in violation of article 2 of the Optional Protocol.

4.2 Referring to claims of violation of article 9 of the Covenant, the State party observes that article 8.2 (1) and (2) of the Code of Administrative Procedure and Enforcement regulates the procedure of detention of persons undergoing administrative proceedings who could be subjected to a short-term deprivation of liberty. The State party observes that the detention of the author was lawful and in line with its national legislation and article 9 of the Covenant.

4.3 The State party further notes that the author's claims of a violation of articles 19 and 21, read in conjunction with articles 2 (2) and 2 (3) of the Covenant are unsubstantiated. The State party observes that the national legislation that provides for the right of peaceful assembly and freedom of expression is coherent with the provisions of the Constitution of Belarus and does not contradict the international norms that allow each State to introduce restrictions to the rights and freedoms of a person that are necessary in a democratic society and in 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 foreseen under article 19 and 21 of the Covenant.

4.4 The State party further observes that the provisions of the Law on Mass Events, along with regulating the organization and conduct of meetings, rallies, street processions or demonstrations, pickets and other mass events in Belarus are aimed at creating conditions for the realization of the constitutional rights of citizens and their freedoms.

4.5 The State party disagrees with the author's argument that the supervisory review procedure does not constitute an effective remedy, and notes that in 2017, out of 3,766 appeals that were introduced under the supervisory review procedure, 3,665 were accepted for review.

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

5.1 In a letter dated 18 March 2020, the author expressed disagreement with the State party's arguments that she did not exhaust all available domestic remedies by failing to appeal the decisions of the Gomel Regional Court under the supervisory review procedures and, with reference to the Committee's jurisprudence, notes that the supervisory review is a common discretionary review process in former Soviet Republics, which the Committee has previously considered not to constitute an effective remedy for the purposes of exhaustion of domestic remedies.<sup>6</sup> She concludes that all available and effective domestic remedies have been exhausted in her case.

<sup>5</sup> Materials on file do not show that the author has raised claims of arbitrary arrest in national proceedings.

<sup>6</sup> Reference is made to *Iskiyaev v. Uzbekistan* (CCPR/C/95/D/1418/2005), para. 6.1.

5.2 The author maintains that the State party has violated her rights under article 9 of the Covenant by unlawfully detaining her for 44 hours. She contests the State party's observations on the application of the Code of Administrative Procedure and Enforcement and notes that her detention did not fall under one of the following purposes enshrined in article 8.2 (1) (2) of the Code: prevention of unlawful actions; filing an administrative record if it is impossible to file the record at the scene of unlawful action; and establishment of the identity of the person. The author explains that she was detained after the event and that the administrative record was filed against her immediately after she was brought to the local police station, namely that there was no need to keep her for 44 hours after her identity was established.

5.3 Regarding the State party's statistics in relation to the number of cases reviewed under the supervisory review procedure, the author believes that this argument is groundless, since the State party failed to demonstrate how many of those cases involved the implementation of the rights to freedom of expression and of assembly.

### **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 takes note of the State party's observations, in which the State party implies that the author has not exhausted the available domestic remedies, as the author's claims for a supervisory review have not been examined by the Prosecutor General or the Chair of the Supreme Court. The Committee also takes note of the author's argument that the supervisory review is a discretionary review process which does not constitute an effective remedy for the purposes of exhaustion of domestic remedies. In that context, the Committee recalls its jurisprudence, according to which a petition for supervisory review submitted to a prosecutor's office, dependent on the discretionary power of the prosecutor, requesting a review of court decisions that have taken effect constitutes an extraordinary remedy and thus does not constitute a remedy that must be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.<sup>7</sup> It also considers that filing with the Chair of a court requests for a supervisory review of court decisions that have entered into force and depend on the discretionary power of a judge constitutes an extraordinary remedy and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.<sup>8</sup> In that regard, the State party notes that in 2017, out of 3,766 appeals that had been introduced under the supervisory review procedure, 3,665 were granted for review (para. 4.5 above). However, the State party has failed to demonstrate how many of those cases involved the implementation of the rights to freedom of expression and of assembly. In the absence of further explanations by the State party in the present case, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication in relation to the author's claims under articles 19 and 21, read alone and in conjunction with articles 2 (2) and (3) of the Covenant.

6.4 Concerning the alleged violations of article 9 of the Covenant, the Committee notes, for purposes of admissibility, that the materials on file do not demonstrate that the author has raised these claims in any of the domestic proceedings against her and thus considers this part of the author's claim inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

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<sup>7</sup> *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; and *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3.

<sup>8</sup> *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3, and *Schumilin v. Belarus*, para. 8.3.

6.5 The Committee takes note of the author's claims that the State party violated her rights under articles 19 and 21, read in conjunction with article 2 (2) of the Covenant. The Committee reiterates 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.<sup>9</sup> The Committee notes, however, that the author has already alleged a violation of her 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 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

6.6 The Committee further notes the author's claims under articles 19 and 21, read in conjunction with article 2 (3) of the Covenant. In the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate her claims for the purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.7 The Committee finally notes that the author's claims as submitted raise issues under articles 19 and 21 of the Covenant, considers these claims sufficiently substantiated for the purposes of admissibility and proceeds with their consideration of the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the 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 claims that her rights to freedom of expression and of assembly have been restricted in violation of articles 19 and 21 of the Covenant, as she was sentenced to pay fines for participating in unauthorized peaceful rallies to protest against the presidential decree "On prevention of social dependency". It also notes the author's claims that the authorities failed to explain why the restrictions imposed on her rights for participating in rallies were necessary in the interests of national security or public safety, public order, the protection of public health, morals or the rights and freedoms of others, as required by article 19 (3) and the second line of article 21 of the Covenant. She therefore considers the restrictions unlawful.

7.3 The Committee notes the author's claim that her right to peaceful assembly under article 21 of the Covenant was violated, since she was brought before the domestic courts and given significant administrative fines for participating in two peaceful rallies. It recalls that in its general comment No. 37 (2020), it states that peaceful assemblies may in principle be conducted in all spaces to which the public has access or should have access, such as public squares and streets.<sup>10</sup> Peaceful assemblies should not be relegated to remote areas where they cannot effectively capture the attention of those who are being addressed, or the general public. As a general rule, there can be no blanket ban on all assemblies in the capital city, in all public places, except one specific location, within a city or outside the city centre, or on all the streets in a city.

7.4 The Committee further recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right, essential for the public expression of an individual's views and opinions and indispensable in a democratic society. Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins,

<sup>9</sup> See *Zhukovsky v. Belarus* (CCPR/C/127/D/2724/2016), para. 6.4; (CCPR/C/127/D/2955/2017), para. 6.4; and (CCPR/C/127/D/3067/2017), para. 6.6.

<sup>10</sup> General comment No. 37 (2020), para. 55.

candlelit vigils and flash mobs. They are protected under article 21, whether they are stationary, such as pickets, or mobile, such as processions or marches.<sup>11</sup> The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience<sup>12</sup> and no restriction to this right is permissible, unless it (a) is imposed in conformity with the law; and (b) is necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), 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.<sup>13</sup> The State party is thus under an obligation to justify the limitation of the right protected by article 21 of the Covenant.<sup>14</sup>

7.5 In the present case, the Committee must consider whether the restrictions imposed on the author's right of peaceful assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. In the light of the information available on file, the author was sentenced by the Sovetskiy District Court of Gomel to significant administrative fines for participating in two peaceful rallies in violation of the provisions of the Law on Mass Events. In that context, however, the Committee notes that the domestic courts did not provide any justification or explanation as to how, in practice, the author's protests 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. In that respect, the State party just refers to the fact that the provisions of the Law on Mass Events, along with regulating the organization and conduct of meetings, rallies, street processions or demonstrations, pickets and other mass events in Belarus, are aimed at creating conditions for the realization of the constitutional rights of citizens and their freedoms (para. 4.4), but does not explain why, in the present case, such constitutional rights of citizens or their freedoms were violated. The State party also failed to show that any alternative measures were taken to facilitate the exercise of the author's rights under article 21.

7.6 In the absence of any further explanations by the State party, the Committee concludes that the State party has violated the author's rights under article 21 of the Covenant.<sup>15</sup>

7.7 The Committee further notes the author's claim that her freedom of expression has been unlawfully restricted in that she was found guilty of an administrative offence and sanctioned to pay significant administrative fines for participating in peaceful rallies to protest against the presidential decree "On prevention of social dependency" in the Gomel region. The issue before the Committee is therefore to determine whether the sanction imposed on the author by the domestic authorities for participating in peaceful rallies with an expressive purpose amounts to a violation of article 19 of the Covenant.

7.8 The Committee recalls its general comment No. 34 (2011), in which it stated, *inter alia*, that freedom of expression is essential for any society and constitutes a foundation stone for every free and democratic society.<sup>16</sup> It notes that article 19 (3) of the Covenant allows for certain restrictions on the freedom of expression, including the freedom to impart information and ideas, only to the extent that those restrictions are provided for by law and only if they are necessary (a) for respect of the rights or reputation of others; or (b) for the protection of national security or public order (*ordre public*) or of public health or morals. Finally, any restriction on freedom of expression must not be overbroad in nature – that is, it must be the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest being protected.<sup>17</sup> The Committee recalls that the onus is on the

<sup>11</sup> *Ibid.*, para. 6.

<sup>12</sup> *Ibid.*, para. 22.

<sup>13</sup> *Ibid.*, para. 36.

<sup>14</sup> *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.

<sup>15</sup> See, for example, *Popova v. Russian Federation* (CCPR/C/122/D/2217/2012), para. 7.6; *Malei v. Belarus* (CCPR/C/129/D/2404/2014), para. 9.7; *Sadykov v. Kazakhstan* (CCPR/C/129/D/2456/2014), para. 7.7; *Tolchina et al. v. Belarus* (CCPR/C/132/D/2857/2016), para. 7.6; and *Zavadskaya et al v. Belarus* (CCPR/C/132/D/2865/2016), para. 7.6.

<sup>16</sup> Para. 2.

<sup>17</sup> *Ibid.*, para. 34.

State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.<sup>18</sup>

7.9 The Committee observes that sentencing the author to administrative fines for participating in peaceful, albeit unauthorized, rallies with an expressive purpose raises serious doubts as to the necessity and proportionality of the restrictions on the author's rights under article 19 of the Covenant. The Committee observes in this regard that the State party has failed to invoke any specific grounds to support the necessity of such restrictions as required under article 19 (3) of the Covenant.<sup>19</sup> Nor did the State party demonstrate that the measures selected were the least intrusive in nature or proportionate to the interest that it sought to protect. The Committee considers that, in the circumstances of the case, the restrictions imposed on the author, although based on domestic law, were not justified pursuant to the conditions set out in article 19 (3) of the Covenant. It therefore concludes that the author's rights under article 19 of the Covenant have been violated.<sup>20</sup>

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 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 provide the author with adequate compensation, including reimbursing the fines and any legal costs incurred by the author, at both the domestic and international levels. 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 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 and thus the State party should revise its normative framework on public events, consistent with its obligation under article 2 (2), with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be 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 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 the official languages of the State party.

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<sup>18</sup> See, for example, *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.

<sup>19</sup> See, for example, *Zalesskaya v. Belarus* (CCPR/C/101/D/1604/2007), para. 10.5.

<sup>20</sup> See, for example, *Shchetko and Shchetko v. Belarus* (CCPR/C/87/D/1009/2001), para. 7.5; *Toregozhina v. Kazakhstan* (CCPR/C/112/D/2137/2012), para. 7.5; and *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), para. 13.4.