



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. 3788/2020*, **

<i>Communication submitted by:</i>	Viktar Babaryka (represented by counsel, Natallia Matskevich and Dmitri Laevski)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	10 July 2020 (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 13 July 2020 (not issued in document form)
<i>Date of adoption of Views:</i>	31 October 2023
<i>Subject matter:</i>	Arrest and placement in pretrial detention of a potential candidate for presidential elections
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Arbitrary detention
<i>Article of the Covenant:</i>	9 (1), (3) and (4)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (a) and (b)

1.1 The author of the communication is Viktar Babaryka, a national of Belarus born in 1963. He claims that Belarus has violated his rights under article 9 (1), (3) and (4) of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is represented by counsel.

1.2 The present communication was submitted for consideration before the State party's denunciation of the Optional Protocol became effective on 8 February 2023. In accordance with article 12 (2) of the Optional Protocol and the Committee's previous case law, the State party continues to be subject to the application of the Optional Protocol in respect of the present communication.¹

* Adopted by the Committee at its 139th session (9 October–3 November 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

¹ See, for example, *Sextus v. Trinidad and Tobago* (CCPR/C/72/D/818/1998), para. 10; *Lobban v. Jamaica* (CCPR/C/80/D/797/1998), para. 11; and *Shchiryakova et al. v. Belarus* (CCPR/C/137/D/2911/2016, 3081/2017, 3137/2018 and 3150/2018).



1.3 On 30 July 2020, on the basis of information requested from and provided by the State party, as well as by the author, the Committee, acting through its Special Rapporteurs on new communications and interim measures, denied the author's request for interim measures to be taken, which would consist in requesting the State party not to interfere with the author's participation in the presidential elections (see paras. 3.7 to 3.11 below).

Facts as submitted by the author

2.1 The author is a banker, philanthropist and public figure. He headed the joint stock company Belgazprombank between the year 2000 and May 2020. On 12 May 2020, he publicly announced his intention to stand in the presidential elections scheduled for 9 August 2020.

2.2 On 20 May 2020, the Central Commission on Elections and Public Referenda (hereinafter referred to as the Elections Commission) registered an initiative group of 8,094 citizens who supported the author's presidential campaign. The group was headed by his son, Eduard Babaryka. Between 21 May and 18 June 2020, the group collected over 400,000 voters' signatures in support of the author, which was the highest number of signatures collected by any of the potential candidates. The author became the main challenger to the incumbent President, Alexander Lukashenko, at the upcoming elections.

2.3 On 31 May 2020, the author published a Declaration on Fair Elections after the mass media reported violations of electoral law. He promised legal support and protection to all citizens whose electoral rights were breached and who experienced coercion during the collection of the signatures. On 1 June 2020, the author filed a complaint with the Elections Commission requesting denial of Mr. Lukashenko's registration as a candidate. The author asked the Elections Commission to investigate violations of electoral law committed by Mr. Lukashenko's initiative group, and to investigate whether Mr. Lukashenko's speeches and acts violated the electoral law in regard to alternative candidates. On 4 June 2020, the Elections Commission rejected the complaint.

2.4 On 4 June 2020, Mr. Lukashenko publicly accused one of the potential candidates for the presidential election of fraud, in relation to a company called PrivatLeasing. Although the author's name was not mentioned, the accusation pointed at him directly as a former head of Belgazprombank Open Joint Stock Company, which had collaborated with PrivatLeasing.

2.5 On 12 June 2020, the Department of Financial Investigations of the State Control Committee announced that it had initiated criminal proceedings against the author under article 235 (2) (legalization of funds obtained by criminal means, or "money laundering", on a particularly large scale) and article 243 (2) (tax evasion on a particularly large scale) of the Criminal Code. On the same day, searches were conducted on the premises of Belgazprombank Open Joint Stock Company, PrivatLeasing, and two other companies – Centaur and Kampari. More than 15 employees of Belgazprombank Open Joint Stock Company were arrested.

2.6 On 18 June 2020, one day before the deadline for collecting signatures for candidates' nominations and before the Elections Commission began registration of the candidates, the author and his son Eduard Babaryka were arrested by the Department of Financial Investigations. Their arrest occurred suddenly, while the author was on his way to the Elections Commission to hand over sheets of paper with the signatures he had collected. He was not allowed to appear before the Department of Financial Investigations to defend himself, or to notify his lawyers and family about his arrest. For more than 24 hours, he was not permitted to talk to his lawyers, notwithstanding the fact that he had communicated their names and contact details to the authorities and his lawyers had attempted to enter the building of the Department of Financial Investigations, where the author was initially detained, half an hour after his arrest.

2.7 The author was placed in a pretrial detention facility of the State Security Committee of Belarus, the investigative body. On 20 June 2020, the State Security Committee ordered him to be remanded in custody, with the authorization of the Public Prosecutor. Between 18 and 25 June 2020, the author was not permitted to communicate confidentially with his lawyers. When he met his lawyers on 19 and 20 June 2020, he could not communicate with them in accordance with client-lawyer confidentiality requirements, nor could he adequately

prepare his defence due to lack of time. On 22, 23 and 24 June 2020, the author's counsels were denied access to the detention facility due to "the epidemiological situation (COVID-19)".

2.8 On the day of the author's arrest, 18 June 2020, the Chairman of the State Control Committee, Ivan Tertel, said to journalists that several criminal cases had been initiated against current and former employees of Belgazprombank under article 209 (fraud), article 210 (embezzlement), article 235 (money laundering), article 430 (acceptance of a bribe), article 431 (offer of a bribe) and article 243 (tax and fee evasion on a large scale) of the Criminal Code. He named the author as the direct organizer and manager of the criminal activities. On the same day, National Television, a State-owned television channel, aired a report with the title "Belgazprombank case: about 20 persons detained, including ex-head of bank Viktar Babaryka". The report accused the management of Belgazprombank of "money laundering" and "criminal schemes" directly associated with the author. On 19 June 2020, the Prosecutor-General, Alexander Konyuk, made the following comment to the Belta news agency: "The criminal acts were committed systematically, over a long period of time, by means of illegal transnational schemes, creating a real threat to the interests of our country's national security both in the financial and in other spheres." On the same day, commenting on the European Union's demand for the author to be released, the Minister of Foreign Affairs, Vladimir Makei, stated that there was solid evidence of the author's involvement in illegal activities.

2.9 Neither the author, who was in custody, nor his counsels, who could not disclose any information about the investigation under threat of criminal liability, could counter the public accusations directed at the author by senior public officials and State media. Thereby the author's presumption of innocence and his right to defence were undermined.

2.10 On 19 June 2020, the initiative group for the author's nomination submitted a list of more than 300,000 voters' signatures to district elections commissions. On 20 June 2020, the author's representative by proxy submitted a request for the author's registration as a candidate to the Elections Commission. On 30 June 2020, the Elections Commission published a statement on its website according to which district elections commissions had recognized 165,744 signatures supporting the author's nomination as being authentic.

2.11 On 19 June 2020, the author was recognized as a political prisoner by a coalition of Belarusian non-governmental organizations. On 29 June 2020, Amnesty International declared him and his son "prisoners of conscience, prosecuted solely for the peaceful expression of their political opinions".

2.12 On 18 and 19 June 2020, the author's counsels submitted two court complaints against his arrest via prosecutorial authorities. On 24 June 2020, Tsentralny District Court of Minsk dismissed their complaints. That judgment was upheld on 26 June 2020 by Minsk City Court. On 30 June 2020, Tsentralny District Court rejected the author's complaint against his being remanded in custody, submitted on 21 June 2020.² That judgment was upheld on 2 July 2020 by Minsk City Court. All the court hearings were closed and took place in the author's absence. From the moment that he was arrested, on 18 June 2020, until the submission of his communication to the Committee, on 10 July 2020, the author was not brought before a judge or other officer authorized by law to exercise judicial power.

2.13 The author notes that he cannot provide any document relating to his arrest, placement in pretrial detention and prosecution, because his lawyers were forced to sign non-disclosure agreements and would incur criminal liability if they were to share the documents. The author supports his communication with public media articles.³

² A copy of the complaint, later provided by the author, is however dated 20 June 2020.

³ Most of the relevant documents were provided by the author on 1 August 2021 following their presentation in a public hearing.

Complaint⁴

3.1 With reference to the Committee's general comment No. 35 (2014),⁵ the author claims that his arrest and placement in pretrial detention were arbitrary, within the meaning of article 9 (1) of the Covenant, because they were the result of his expression of his political opinions and his exercise of his rights and freedoms under articles 19, 25 and 26 of the Covenant. No suspicions or charges had been put forward against him by law enforcement authorities until the public announcement of his presidential ambitions and the sharp increase in his ratings as a potential candidate for the elections.

3.2 The author argues that his detention was unnecessary. The investigators did not provide any evidence that he might flee, interfere with the investigation or commit an offence. His personal circumstances were not taken into consideration, such as his impeccable reputation, his permanent residence in Belarus and his campaigning in the presidential elections. The need to ensure equal campaigning opportunities for all candidates by allowing him to participate in the electoral process was disregarded. Since his arrest, the author has had no access to the media, his campaign team and voters, and he has had no information about the election campaign. Alternative restrictive measures have not been considered, despite the fact that prior to and after his arrest, the author announced his readiness to appear at a designated place and time upon request of the investigator.

3.3 Since his arrest, the author has not been brought before a judge or other officer authorized by law to exercise judicial power in order to establish whether he should remain in custody. His detention was authorized by the Prosecutor, who cannot be considered as an officer exercising judicial power. Judicial complaints filed by the author in relation to his arrest and pretrial detention were examined in his absence in closed hearings.

3.4 For more than 24 hours following his arrest and then again until 25 June 2020, the author had no opportunity for confidential communication with his lawyers, which amounted to a violation of his right to have adequate time and facilities for the preparation of his defence.

3.5 The author concludes that his arrest and pretrial detention have not been reasonable, necessary and fair and have been accompanied by violations of basic procedural guarantees. He requests the Committee to recognize violations of article 9 (1), (3) and (4) of the Covenant, interpreted in the light of the Committee's general comment No. 35 (2014) (paras. 12, 32–34, 38, 42 and 46).

3.6 The author asks the Committee to request that the State party release him immediately, make a public apology, provide him appropriate compensation and prevent similar violations in the future.

3.7 The author requested the Committee to adopt interim measures and ask the State party not to prevent him from standing in the presidential elections and to ensure that he had appropriate access to the media, voters and his campaign team.

3.8 On 13 July 2020, the Committee, acting through its Special Rapporteurs on new communications and interim measures under rule 94 of its rules of procedure, requested the State party to provide information, no later than 22 July 2020, on whether the author's deprivation of liberty and the associated risks of irreparable harm had been properly assessed in the domestic proceedings, especially in the light of the author's right to enjoy and exercise his political rights as a candidate in the upcoming 2020 presidential elections.

3.9 In a note verbale dated 24 July 2020, the State party expressed its disagreement with what it perceived as an arbitrary setting of deadlines for providing explanations or statements on a communication, contrary to the procedure established in the Optional Protocol. However, the State party provided observations on the admissibility and the merits of the communication in a spirit of goodwill and cooperation with the Committee (see paras 4.1 to 4.16 below). In response to the Committee's enquiry, the State party stated that the author's

⁴ The author has submitted another communication in relation to the same facts, raising additional claims under art. 9 of the Covenant (extension of detention), as well as claims under articles 14, 19, 25 and 26.

⁵ See para. 17.

request for registration as a candidate for the presidential elections had been denied for reasons unrelated to his arrest and placement in custody.

3.10 On 29 July 2020, the author responded to the State party's submission of 24 July 2020 (see paras. 7.1 to 7.4 below) arguing that his placement in custody had prevented him from pursuing his electoral campaign. He stated that on 16 July 2020, his campaign headquarters had united with the headquarters of another registered candidate. Therefore, he made a request to the Committee for another interim measure recommending to the State party not to interfere with his participation in the presidential elections, as a leader of an alternative standpoint, which would include providing him with appropriate access to his campaign headquarters, to voters and to the media.

3.11 On 30 July 2020, on the basis of updated information submitted by both parties, the Committee, acting through its Special Rapporteurs on new communications and interim measures, denied the author's request for interim measures to be taken.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 24 July 2020, the State party provided its observations on admissibility and the merits.

4.2 On 18 June 2020, the Department of Financial Investigations of the Committee of State Control, acting under article 108 (1) of the Criminal Procedure Code, arrested the author on suspicion of having committed offences under article 243 (2) (tax and fee evasion), article 235 (2) (legalization – "laundering" – of assets acquired by criminal means) and article 431 (2) (bribery), of the Criminal Code. On 20 June 2020, the author was charged under these provisions and placed in pretrial detention.

4.3 Refuting the author's claims about violations of article 9 (1), (3) and (4) of the Covenant, the State party notes that under article 2 (1) of its Constitution, an individual and his or her rights and freedoms and guarantees of their fulfilment are the highest value and purpose of society and the State. Under article 21 (1) and (3) of the Constitution, the State guarantees to its citizens their rights and freedoms provided by the Constitution, laws, and the State's international obligations. The Constitution guarantees everyone's personal non-property rights, such as freedom, security and dignity of person. Restriction or deprivation of freedom is only possible in cases, and according to the procedure, established by law. Under article 25 (1) and (2) of the Constitution, a person placed in custody has a right to judicial review of the legality of his or her arrest and detention.

4.4 Under article 11 (1) and (3) of the Criminal Procedure Code, no one can be arrested and placed in custody or under house arrest without legal grounds and in violation of the procedure established by the Criminal Procedure Code. Under article 107 (2) (1) and (3) (1) of the Criminal Procedure Code, an arrest can only be imposed on a person suspected of having committed an offence punishable by deprivation of liberty or arrest. Under article 108 (1) of the Criminal Procedure Code, a suspect can be arrested by a prosecuting authority under one of the following conditions: (a) if the person is caught while committing an act that constitutes a danger to the public and is punishable by the criminal law, or immediately after committing it; (b) if witnesses, including the victim, directly point to the person as the perpetrator or apprehend him or her in accordance with the procedure established by article 109 of the Criminal Procedure Code; (c) if clear signs are visible on the person, on their possessions, or on their clothes or other items used by them, in their dwelling, in other spaces used by them, in their workplace or in their vehicle, pointing to their involvement in committing the act constituting a danger to the public; or (d) if there are other sufficient grounds to suspect the person of having committed the offence and if that person has attempted to hide from the scene of the crime or from the prosecuting authorities, or does not have permanent residence, or resides in another location, or his or her identity has not been established.

4.5 Under article 126 (1) of the Criminal Procedure Code, only persons suspected or accused of having committed offences punishable by a deprivation of liberty of more than two years can be held on remand. This does not apply to less grave economic offences, except for smuggling, illegal export or transferral, for the purposes of export, of objects under export control, and legalization ("laundering") of assets obtained by criminal means. Persons

suspected or accused of grave or particularly grave crimes against the peace and security of humanity, crimes against the State, military crimes or crimes accompanied by attempts against the life and health of a person may be remanded on the sole grounds of the gravity of the crime. In exceptional cases, this measure can be applied in the case of a person suspected or accused of less grave economic crimes or crimes punishable with deprivation of liberty of less than two years, if such persons do not have permanent residence in the territory of Belarus or if their identity has not been established. Suspects and accused persons who have hidden from prosecuting authorities and courts can be remanded, notwithstanding the nature of the offence and the corresponding sanctions.

4.6 The author's arrest was well founded and carried out in strict compliance with domestic legislation. Procedural acts were drawn up to register his arrest. The author confirmed by his signature that he had examined them. His rights and obligations and the procedure for challenging his arrest were explained to him in writing. His counsels were allowed to examine these documents.

4.7 The power to authorize placements in custody is vested in the Prosecutor General of Belarus, regional prosecutors, the prosecutor of Minsk, prosecutors of districts, city districts and cities, and inter-district and equivalent itinerant prosecutors, and their deputies. Under article 126 (4) of the Criminal Procedure Code, remand can also be ordered by the Chair of the Investigative Committee of Belarus, the Chair of the Committee of State Security of Belarus and persons acting in their capacity. Having examined the author's criminal case file, on 20 June 2020 the Office of the Prosecutor General of Belarus authorized his pretrial detention. The author's placement in custody was necessary because he had been charged with crimes punishable by deprivation of liberty of more than two years. Therefore, the investigative authorities had sufficient grounds to believe that he might flee the investigation and the trial, and hinder the preliminary investigation and the examination of the criminal case in court, including by exercising illegal influence over participants in the criminal proceedings, by concealing or falsifying evidence and by committing an act constituting a danger to the public punishable under the criminal law.

4.8 Under article 126 (5) of the Criminal Procedure Code, a person placed in pretrial detention or his or her counsel or legal representative can appeal against the decision of the prosecutorial authority following the procedure established under article 143 of the Criminal Procedure Code and chapter 16 of that Code. The author was informed of the decision to place him in in pretrial detention and of the procedure for challenging it. He signed a confirmation that he had received copies of the relevant procedural documents.

4.9 Under article 144 (1)–(3) of the Criminal Procedure Code, judicial control of the legality and necessity of an arrest, and of placement in pretrial detention, is carried out within 24 and 72 hours, respectively, following the submission of the complaint to the territorially competent judge. The complaint is examined in a closed hearing. The victim and his or her representatives and counsels, as well as legal representatives of the suspect or the accused, can take part in the hearing. When necessary for examination of the complaint, the judge can summon the detained person.

4.10 The author's arrest was challenged by his representatives, the attorneys P. and L., before Tsentralny District Court of Minsk. On 24 June 2020, a judge of that Court rejected their complaint. On 26 June 2020, Minsk City Court verified the legality and reasoning of that judgment and rejected an appeal submitted by the author's counsels.

4.11 The author's placement in custody was also challenged before Tsentralny District Court. On 30 June 2020, having examined the complaint in compliance with the procedure established by law, a judge of Tsentralny District Court rejected it. This judgment was upheld on 2 June 2020 by Minsk City Court.

4.12 Under article 145 (6) of the Criminal Procedure Code, a decision of a higher court adopted following an appeal enters into force immediately, is final and cannot be further challenged. It can, however, be subject to a supervisory review appeal under article 404 of the Criminal Procedure Code. The author has not exercised his right to submit a supervisory review appeal against the judgments of 24 and 30 June 2020 of Tsentralny District Court. The State party concludes that the author has not exhausted all domestic remedies available

for challenging his arrest and placement in pretrial detention and that the communication should be considered inadmissible under article 2 of the Optional Protocol.

4.13 Regarding the author's complaints about not being present at the court hearings, about the hearings being closed and about the fact that a non-disclosure obligation was imposed on his counsels, the State party submits that under article 144 (2)–(4) of the Criminal Procedure Code, judicial verification of the legality and necessity of an arrest is done exclusively in closed court hearings. When necessary for the examination of the complaint, the judge can summon the person being held in custody. Individuals who participate in a closed court hearing sign a confidentiality agreement on non-disclosure of information about the hearing. The complaints of the author and his counsels were examined on 24, 26 and 30 June and 2 July 2020 in closed court hearings. The author's participation was not considered necessary by the courts. The author's counsels, the attorneys P. and L., participated in the hearings and signed confidentiality agreements.

4.14 The State party believes that in compliance with the criminal procedure legislation, the author has been ensured his right to a fair hearing by a competent, independent and impartial tribunal established by law, as well as his right to defence, in accordance with article 14 of the Covenant. The courts legitimately rejected his complaints concerning his arrest and placement in custody and his claims under article 9 (1), (3) and (4) of the Covenant are not well substantiated.

4.15 The State party submits that the author's request for registration as a candidate for the presidential elections was denied under article 48 (10) (use of financial assistance of an organization established by foreign organizations) and article 68 (2) (2) (substantial inaccuracy of data included in a declaration) of the Electoral Code. The denying of his registration as a candidate is unrelated to his placement in custody. Domestic electoral legislation does not prevent persons placed in custody from participating as candidates in elections. The State party notes that 367,179 signatures were submitted to territorial commissions to support the author's request for registration as a candidate, rather than 400,000 as stated in the communication. The territorial commissions recognized 165,749⁶ signatures as authentic, which is not a significantly higher number than the number of signatures collected by most of the potential candidates. Under domestic legislation, 100,000 signatures suffice for a candidate's registration.

4.16 Regarding the complaint submitted by the author to the Elections Commission against the President, Mr. Lukashenko, and his initiative group, the State party states that that complaint was examined on 4 June 2020 by the Elections Commission with the participation of the head of the author's initiative group, Eduard Babaryka. The complaint was based on the author's subjective opinion and anonymous messages from sources on the Internet, which alleged that voters were coerced into giving their signatures in favour of the President, Mr. Lukashenko. Similar anonymous complaints were submitted to the Elections Commission against the author and were likewise rejected for lack of evidence. None of the potential candidates for the elections and none of the 15 registered initiative groups received warnings from the Elections Commission about violation of the electoral legislation. The signatures were freely collected, in any place, with the participation of a large number of voters. From the end of the collection of signatures on 19 June 2020 to the end of the registration of the candidates on 14 July 2020, no campaigning events by potential candidates were scheduled on the election calendar.

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

5.1 In his additional submissions, dated 26 July 2020, and his comments on the State party's observations, dated 29 July 2020, the author provided the following information.

5.2 On 14 July 2020, the Elections Commission refused to register the author as a candidate for the presidential elections. On 15 July 2020, his attorney challenged this decision before the Supreme Court of Belarus, annexing a power of attorney notarized by a notary. On 16 July 2020, the Supreme Court issued an inadmissibility decision on the grounds that the complaint had not been personally submitted by the author. On 17 July 2020, the author

⁶ The author submitted different figures in para. 2.10 above.

submitted another complaint to the Supreme Court from the temporary detention facility. On 22 July 2020, the Supreme Court declared the complaint inadmissible due to its submission beyond a three-day deadline. Under article 68-1 of the Electoral Code, a decision by the Central Elections Commission refusing to register a candidate for presidential elections can be challenged with the Supreme Court within three days of the issuance of the decision. Under article 150 (3) of the Civil Procedure Code, procedural deadlines start running on the day following the calendar date or the event that defines their beginning. The author insists that the deadline for challenging the decision of the Elections Commission was 17 July 2020. Moreover, if he had not been detained, he would have initially submitted the complaint personally and would have been spared these types of pseudo-judicial obstacles. His inability to challenge the Elections Commission's decision resulted directly from his placement in detention.

5.3 The decision of the Elections Commission denying the author's registration as a candidate was based on a letter by the State Control Committee, which accused the author of criminal offences. However, no facts about the author's alleged criminal activities had yet been confirmed by any court conviction. Also, that letter had not been previously shown to the author or his attorney. Placed in custody, the author did not have any possibility of attending the Elections Commission's hearing and could therefore not provide arguments to rebut the accusations contained in the letter. The Elections Commission's decision was also not communicated directly to the author within the deadlines for appealing against the decision.

5.4 The author notes that the State party has not provided any explanations as to how public authorities and courts assessed the risks of his deprivation of liberty interfering with his participation in the election campaign and as to how they considered the possibilities of compensating his being prevented from personally participating in the election procedures. His arrest at the same time as the arrest of the leader of his initiative group, Eduard Babaryka, prevented him from submitting sheets with more than 40,000 signatures that had been collected in support of him. The author's placement in custody deprived him of the possibility of registering as a candidate for the presidential elections and of campaigning in the elections.

State party's additional observations on the merits

6. In a note verbale dated 19 July 2021, the State party informed the Committee that on 6 July 2021, the Supreme Court of Belarus had found the author guilty, under articles 235 (2) and 430 (3) of the Criminal Code, of legalizing unlawfully obtained assets and of accepting a bribe of a particularly large amount by an organized group. Under article 72 (3) of the Criminal Code, the author had received an aggregate sentence of 14 years of imprisonment in a special regime penal colony, and a fine of 145,000 Belarusian roubles, and was prohibited from occupying positions related to organizational, administrative and economic-related duties for a period of five years. Under article 370 (5) of the Criminal Procedure Code, judgments of the Supreme Court are not subject to appeal. The author's conviction entered into force on 6 July 2021.

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

7.1 On 1 August 2021, the author submitted further comments on the State party's submissions of 24 July 2020 and 19 July 2021, in relation to the admissibility and the merits of the communication.

7.2 Responding to the State party's argument that the author failed to exhaust domestic remedies, the author states that his communication deals with violations of his rights under article 9 (1), (3) and (4) of the Covenant during his arrest on 18 June 2020 and during his placement in pretrial detention on 20 June 2020. He has exhausted all domestic remedies by submitting complaints to courts of first and second instance.

7.3 The author provides several documents to support his claim of exhaustion of domestic remedies, including copies of his court complaints and of the relevant judicial decisions, except for the judgment adopted by Minsk City Court on 2 July 2020. Sharing these documents has become possible because they have been used in a public hearing.

7.4 Regarding the State party's argument about his failure to submit supervisory review appeals, the author refers to the consistent position of the Committee according to which supervisory review appeals to judicial authorities are not an effective remedy for the purposes of article 5 (2) (b) of the Optional Protocol.

7.5 The author submits that the State party's observations support his claims that, in violation of article 9 (3) of the Covenant, he was not brought promptly before a judge or other officer authorized by law to exercise judicial power. He refers to the Committee's practice, according to which the requirement of promptness under article 9 (3) means a period of a maximum of 48 hours from the moment of detention⁷ and a public prosecutor cannot be considered as an officer authorized by law to exercise judicial power.⁸ The author notes that he has been deprived of liberty since 18 June 2020. He appeared before a court for the first time at the beginning of his trial on 17 February 2021, that is, eight months after his arrest.

7.6 In response to the State party's arguments about the legality of his arrest and remand in custody under domestic legislation, the author submits that according to paragraph 12 of the Committee's general comment No. 35 (2014), an arrest and remand in custody which comply with domestic legislation may still be arbitrary. The author also recalls that in paragraph 38 of the same general comment, the Committee held that detention in custody of persons awaiting trial is to be the exception rather than the rule.

7.7 The author notes that the orders on his arrest and placement in pretrial detention and the judicial decisions adopted following his complaints do not mention specific facts and evidence pointing to the existence of real threats of the author interfering with the investigation, committing an offence or fleeing. These documents cite abstract and generic provisions of domestic legislation and do not examine the specific circumstances and personal qualities of the author, therefore the author's arrest and placement in pretrial detention are arbitrary under article 9 (1) of the Covenant. In addition, the orders on his arrest and placement in pretrial detention do not contain any information indicating that his detention was an exceptional measure and that other alternative measures had been considered.

7.8 The author notes that when he attempted to challenge his placement in custody before national jurisdictions, he asked for his placement in custody to be substituted by a written undertaking not to leave area of residence. These requests were not dismissed without reasoning. Furthermore, on 8 July 2020, the author requested the investigator to substitute his placement in custody with house arrest. This would have allowed for reduced legal hurdles to the author participating in the election process. That request was not granted. According to the author, this amounted to a violation of article 9 (3) of the Covenant, which provides that it is not to be the general rule that persons awaiting trial are detained in custody.

7.9 The author also notes that the State party has not responded to his allegations that he was deprived of liberty because of his peaceful expression of his political opinions and his exercise of his rights and freedoms under articles 19, 25 and 26 of the Covenant. The author refers to paragraph 17 of the Committee's general comment No. 35 (2014), which states that arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant, including freedom of opinion and expression (art. 19), is arbitrary. Arrest or detention on discriminatory grounds in violation of article 26 is also arbitrary.

7.10 As regards the State party's reference to his conviction, the author indicates that his communication does not deal with his criminal charges and conviction. The fact that he has been convicted is not a reason to conclude that there was no violation of article 9 (1), (3) and (4) of the Covenant during his arrest and placement in pretrial detention. The author also notes that the suspicions and charges relating to tax evasion (art. 243 of the Criminal Code) and bribery (art. 431 of the Criminal Code), which served as the grounds for his arrest and remand in custody, were not examined in court. Furthermore, the author claims that his trial has not respected the basic guarantees of article 14 of the Covenant. The author is planning to submit a separate communication in this regard.

⁷ *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), para. 7.4.

⁸ See the Committee's general comment No. 35 (2014), para. 32.

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 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.

8.3 The Committee acknowledges the State party's argument that the author has failed to seek a supervisory review of the impugned judicial decisions. The Committee recalls its jurisprudence according to which filing requests for supervisory review with the president of a court directed against court decisions that have entered into force and depend on the discretionary power of a judge constitutes an extraordinary remedy, and 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. The Committee further 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.⁹ The State party does not provide any information or arguments to demonstrate that further supervisory review appeals before judicial and prosecutorial authorities would have constituted an effective domestic remedy in the circumstances of the case. The State party acknowledges (see para. 4.12 above) that Minsk City Court's decisions in relation to the author's complaints of his arrest and placement in pretrial detention are final and not subject to further judicial appeals. Therefore, the Committee considers that it is not precluded by articles 2 and 5 (2) (b) of the Optional Protocol from examining the present communication.

8.4 The Committee considers the author's claims under article 9 (1), (3) and (4) of the Covenant sufficiently substantiated for the purposes of admissibility and proceeds with its examination of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee takes note of the State party's arguments that the author's arrest and remand in custody were compliant with domestic legislation. The Committee recalls, however, that under article 9 (1) of the Covenant, the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and lack of due process of law, as well as elements of reasonableness, necessity and proportionality.¹⁰ Under article 9 (3) of the Covenant, it is not to be the general rule that persons awaiting trial are detained in custody. Pretrial detention should be the exception rather than the rule. Detention pending trial must be lawful and based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.¹¹

9.3 The Committee observes that the domestic jurisdictions made their judgments about the legality of the author's arrest and pretrial detention exclusively on the grounds that the

⁹ *Shchukina v. Belarus* (CCPR/C/134/D/3242/2018), para. 6.3; *Gryk v. Belarus* (CCPR/C/136/D/2961/2017), para. 6.3; *Tolchin v. Belarus* (CCPR/C/135/D/3241/2018), para. 6.3; and *Belenky v. Belarus* (CCPR/C/135/D/2860/2016), para. 8.3.

¹⁰ See the Committee's general comment No. 35 (2014), para. 12.

¹¹ *Ibid.*, para. 38.

author was suspected of an offence punishable by deprivation of liberty of more than two years (see para. 4.7 above), without examining his personal circumstances. It is not disputed between the parties that the author had no prior criminal record and was a permanent resident of the State party. Furthermore, the initiation of criminal proceedings against the author was publicly announced on 12 June 2020, six days prior to his arrest (see para. 2.5 above). Earlier, on 4 June 2020, two weeks prior to the author's arrest, the President, Mr. Lukashenko, had already publicly hinted at the author's guilt for fraud (see para. 2.4 above). Despite these announcements which pointed to the imminence of the author's prosecution, the author did not attempt to flee but, to the contrary, remained on the territory of the State party and continued to actively campaign for the presidential elections. The case file does not include any information about attempts by the author to commit an offence or interfere with the investigation over this period. In the light of these facts, it does not appear that the conclusions of the national jurisdictions that the author's placement in pretrial detention was necessary in order to prevent him from fleeing, committing an offence or interfering with the investigation were justified. Furthermore, it does not appear from the case file that the national authorities considered less restrictive alternatives to the author's pretrial detention.

9.4 In relation to the author's claims that his arrest and pretrial detention were arbitrary because they were the result of his expression of his political opinion and his exercise of his rights and freedoms under articles 19, 25 and 26 of the Covenant, the Committee observes that the author has submitted another communication which claims violations of articles 19, 25 and 26 in relation to the same facts. In order not to prejudge the outcome of this second communication, the Committee will only consider in the present case the alleged arbitrariness of the author's arrest and pretrial detention. The Committee observes in this regard that with the criminal investigation already ongoing for almost a week, the fact that the author was arrested one day prior to the opening of registration for candidates for the election, without any visible motives, presents elements of inappropriateness, injustice and lack of predictability incompatible with prohibition of arbitrary detention.

9.5 In view of the above, the Committee considers that the author's arrest and placement in pretrial detention amounted to arbitrary detention, in violation of article 9 (1) and (3) of the Covenant.

9.6 Regarding the alleged violation of the procedural guarantees provided by article 9 of the Covenant, the Committee recalls that detainees should be given prompt and regular access to lawyers.¹² Under article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge is to be brought promptly before a judge or other officer authorized by law to exercise judicial power. A public prosecutor cannot be considered as an officer exercising judicial power under this provision.¹³ In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional.¹⁴ The individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power.¹⁵ Article 9 (4) of the Covenant entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. The adjudication of the case should take place as expeditiously as possible.¹⁶

9.7 In the present case, the author was arrested on 18 June 2020 at 8.48 a.m. and was prevented from meeting his lawyers for more than 24 hours following his arrest. According to the author, he was not permitted to communicate confidentially with his lawyers for several days afterwards, nor could he adequately prepare his defence due to lack of time. The author's counsels were even denied access to the detention facility due to "the epidemiological situation (COVID-19)" (see para 2.7 above). The decision to remand him in custody was taken by a prosecutor, who is not authorized by law to exercise judicial power, contrary to

¹² Ibid., para. 58.

¹³ Ibid., para. 32.

¹⁴ Ibid., para. 33.

¹⁵ Ibid., para. 34.

¹⁶ Ibid., paras. 39 and 47.

article 9 (3) of the Covenant.¹⁷ Although the author's lawyers attempted to challenge his arrest in court by submitting complaints via investigative authorities on 18 and 19 June 2020, their first complaint was not transmitted to a court and their second complaint was only considered by judicial authorities five days later, on 24 June 2020 (see para. 2.12 above). Their complaint against the author's remand in custody submitted on 21 June 2020 was considered by judicial authorities nine days later, on 30 June 2020. Not only did these delays significantly exceed 48 hours, which, according to the Committee, is the maximum time permissible under article 9 of the Covenant, but they also contradict the State party's affirmation that the author's arrest and pretrial detention were compliant with domestic legislation, which provides for judicial control of the legality and necessity of an arrest, and of pretrial detention, within 24 and 72 hours, respectively, following the submission of the complaint. The Committee further observes that the author was not allowed to attend the court hearings on his complaints, and was not brought before a judge until his trial, eight months after his arrest.¹⁸ Finally, the Committee notes with concern that the author's counsels were obliged to sign non-disclosure agreements, which prevented them from enclosing all relevant documents in the author's communication to the Committee, thereby creating obstacles to the author's attempts to defend his rights under article 9 of the Covenant.

9.8 Therefore, the Committee concludes that the State party has violated the author's rights under article 9 (1), (3) and (4) of the Covenant, by failing to provide the author with rapid access to lawyers following his arrest and to permit him to communicate with them confidentially, by denying him rapid and personal access to a judge in order to challenge his arrest and placement in pretrial detention, and by forcing the author's lawyers to sign non-disclosure agreements which prevented the author from enclosing all the relevant documents in his communication to the Committee.

10. 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 article 9 (1), (3) and (4) of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, State party is obligated to provide the author with adequate compensation for the violations suffered. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

12. On becoming a party to the Optional Protocol, the State party recognized the competence of the Committee to determine whether there has been a violation of the Covenant. The present communication was submitted for consideration before the State party's denunciation of the Optional Protocol became effective on 8 February 2023. Since, 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.

¹⁷ *Adamovich v. Belarus* (CCPR/C/133/D/2619/2015), para. 7.5.

¹⁸ *Ibid.*, para. 7.4.