



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. 2313/2013*, **

<i>Communication submitted by:</i>	Evgeny Osincev (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kyrgyzstan
<i>Date of communication:</i>	19 August 2013 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 10 December 2013 (not issued in document form)
<i>Date of adoption of Views:</i>	15 March 2019
<i>Subject matters:</i>	Denial of fair trial; arbitrary detention
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Fair trial; arbitrary detention; conditions of detention; legal assistance; cruel and inhuman treatment
<i>Articles of the Covenant:</i>	7, 9, 10 and 14
<i>Article of the Optional Protocol:</i>	2

* Adopted by the Committee at its 125th session (4–29 March 2019).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



1. The author of the communication is Evgeny Osincev, a national of Kyrgyzstan, born in 1964. He claims that the State party has violated his rights under articles 7, 9, 10 and 14 of the Covenant. The Optional Protocol entered into force for Kyrgyzstan on 7 January 1995. The author is not represented by counsel.

The facts as submitted by the author

2.1 On 4 June 2009, the author was called into the offices of the State Financial Police in Bishkek. He met an investigator, E, who told him that he had a few questions to ask him informally. At 8 p.m., after three hours of informal questioning, the investigator told the author that he would start to officially interrogate him, at which point the author refused to answer any more questions and asked for a lawyer. His request for a lawyer was denied and the investigator told him that there was a complaint against him and the police had enough information to arrest him right away.¹ When the author asked to look at the complaint, the investigator refused and told him that he was being questioned as a witness and the investigator did not have to show him any documents. The author was then handcuffed and subjected to psychological and physical pressure to sign an interrogation report, which he refused to do.² At about 10 p.m. the author started to feel ill and asked for a doctor or medication;³ however, his request was denied. He was then transferred to a temporary detention facility, where he was held until 6 June 2009. He was not granted access to a lawyer and was deprived of contact with his family. During his detention between 4 and 6 June, he was fed only once, on 5 June 2009.⁴

2.2 On 6 June 2009, at 9 a.m., the author was again taken for interrogation to the State Financial Police in Bishkek. He was not informed about either the purpose of the investigation or the nature and cause of the possible charges against him, and was again subjected to psychological and physical pressure.⁵ At 5 p.m., he was taken to the office of a judge in the Pervomaisky district court in Bishkek. At that point, the investigator told the judge that the author was charged with fraud and requested the judge to authorize the author's pretrial detention for a period of two months. The author was not allowed to speak to the judge and was quickly taken out to the corridor, while the investigator remained in the judge's office. Shortly thereafter, the investigator came out of the judge's office and informed the author that the judge had authorized his detention for two months but did not give the author a copy of the decision. The author notes that, despite the requirements of article 110 of the Criminal Procedure Code, no lawyer or prosecutor was present during this hearing.⁶

2.3 On 8 June 2009, the author was transferred to the pretrial detention facility "SIZO No. 1" in Bishkek and was first put under quarantine for two weeks. While quarantined, the author was not allowed to contact his relatives or a lawyer, and he spent 18 days incommunicado. While under quarantine, he was held without being given bed linens, a change of clothes or personal hygiene items such as soap, toothbrush and toothpaste, and did not have access to showers. He was held in a 16-person quarantine cell together with 27 other inmates, who had four mattresses and two light blankets between them for sleeping. On 22 June, the author was transferred to a regular cell that had better conditions but was also overcrowded. He was held in an eight-person cell together with 13 other inmates. Inmates had to take turns to sleep, and the light in the cell was always kept on.

2.4 On 26 June 2009, the author was able to contact his lawyer for the first time; however, the investigator did not allow the lawyer to access some of the documents in the

¹ The author was investigated for changing shipping codes on several goods bought by an acquaintance in China, then fraudulently receiving them in Kyrgyzstan and extorting money from his acquaintance in exchange for the goods.

² No further details provided.

³ No further details provided.

⁴ The author claims that detainees at this temporary detention facility were fed only once a day.

⁵ No further details provided.

⁶ The decision contains the name of a lawyer who was allegedly present during the hearing; however, it was determined by the internal investigation by the Ministry of Justice in 2012 that this lawyer had not been present during any of the interrogations or hearings and had signed the documents *post factum*.

case file until 10 July.⁷ The lawyer was able to appeal the author's arrest on 8 July. On 10 July, the author's lawyer submitted a complaint to the Bishkek city prosecutor against the investigator for his unlawful interrogation and denial of access to legal assistance on 4 June.⁸

2.5 On 24 July 2009, the Bishkek city court quashed the 6 June decision of the Pervomaisky district court to detain the author for two months and ordered his release under house arrest. The court held that the case investigator did not produce any evidence that the author had tried to abscond or to obstruct the investigation, that he had a permanent place of residence and had established his identity, and that he hadn't been provided with legal assistance between 4 and 6 June.

2.6 On 28 July 2009, the investigator brought a new charge of extortion against the author, despite the fact that there had been no formal investigation of this charge and no formal complaint of extortion against him. On the same day, the investigator formally closed the investigation and sent the case for trial.

2.7 Sometime in August 2009, the criminal case against the author was sent to the Sverdlovskiy district court and the trial was scheduled for September 2009. However, the alleged victim of the crime and her witnesses kept missing court hearings. On 31 May 2010, the author officially motioned the court to issue a warrant to forcibly bring in the victim and her witnesses for a hearing. The motion was granted. However, instead of issuing the requested warrant, the court sent the case back to the prosecutor's office, ordering it to ensure the victim's and witnesses' attendance during the trial and indicating that the court had not been provided with evidence of the author's guilt.⁹

2.8 In August 2010, the case against the author was returned by the prosecutor's office to the Sverdlovskiy district court, but was assigned to a different judge. On 14 October, the author was found guilty of fraud and extortion and sentenced to four years' imprisonment at a minimum-security prison. The author claims that the court did not address his claims of use of physical and psychological pressure against him, although these allegations are reflected in the verdict, or that he had been denied legal assistance for over a month after his arrest. The author also claims that he has submitted to the trial court evidence of his alibi for the dates when the fraud was allegedly committed but that the court viewed this as an attempt to escape punishment.

2.9 On 20 December 2010, the criminal chamber of the Bishkek city court dismissed the author's cassation appeal and confirmed the sentence of the Sverdlovskiy district court. The cassation court did not inform the author about the date and place of the court session and based its decision only on written submissions.¹⁰

2.10 On 6 December 2011, the Supreme Court of Kyrgyzstan dismissed the author's appeal for a supervisory review and confirmed the decisions of the lower courts.

2.11 In August 2012, the author submitted a complaint to the Prosecutor General requesting reopening of the case based on new circumstances and stating that he could prove his innocence. On 28 September, the Prosecutor General dismissed the complaint. The author submits that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author claims that he has suffered cruel, inhuman and degrading treatment, with use of psychological and physical pressure on 4 and 6 June 2009 after being detained by the State Financial Police in Bishkek, in violation of article 7 of the Covenant.

3.2 He claims a violation of article 9 of the Covenant due to his arbitrary arrest and detention from 4 June to 24 July 2009. He claims that the domestic Criminal Procedure

⁷ The author provides a copy of a motion filed by his lawyer on 10 July 2009 asking the investigator to provide him access to case files.

⁸ No information is provided as to the prosecutor's response to the complaint.

⁹ The author provides a copy of the court decision.

¹⁰ In its decision the cassation court states that the author's lawyers had been informed about the hearing but had failed to attend.

Code allows for pretrial detention only in those cases where the maximum penalty for the crime exceeds three years in prison,¹¹ while he was charged only with fraud, which carries a maximum penalty of three years in prison. Moreover, with regard to economic crimes, which includes fraud, suspects cannot be arrested at all.¹² The author also claims that he was not informed of any charges against him and was not given a copy of the Pervomaisky district court's decision of 6 June 2009 sanctioning his detention for two months, hence denying him the right to appeal it until 8 July.

3.3 The author claims that between 4 June and 22 June 2009 he was held incommunicado and in prison conditions that constituted a violation of article 10 of the Covenant.

3.4 Finally, he claims that his rights under article 14 of the Covenant were violated as: (a) the courts were not impartial and ignored his alibi, and there were numerous pretrial procedural violations and a lack of direct evidence tying him to the alleged crimes; (b) the court proceedings were unnecessarily prolonged for over a year, during which he was under house arrest; (c) he was denied legal assistance until 26 June 2009 despite having requested it from the time of his initial interrogation on 4 June.

State party's observations on the merits

4.1 In a note verbale dated 17 February 2014, the State party noted that, at the time of the events in question, the Constitution of Kyrgyzstan allowed for a 48-hour detention period before a person had to be brought before a judge. The author therefore was brought before a judge at the Pervomaisky district court within the legally required time limit.

4.2 With regard to the author's arrest, the State party notes that the author has misinterpreted article 110 of the Criminal Procedure Code and that suspects in economic crimes can be detained unless they post bail prescribed by the law. However, based on the documents submitted by the author, it is unclear to the State party if such bail was posted. The State party notes that, in exceptional cases, article 110 of the Criminal Procedure Code allows for the arrest of suspects charged with crimes that carry a maximum penalty of up to three years in prison if one of the following circumstances is present in the case: the suspect does not have a permanent place of residence; or his/her identity has not been established; or he/she has been hiding from law enforcement authorities or courts.

4.3 The State party further submits that, in accordance with the Constitution of Kyrgyzstan and international treaties signed by the State party, everyone has the right to a review of their sentence by a higher court. It notes that, in the present case, the author has gone through all instances of the domestic judicial system and has exhausted all available legal remedies. The State party further notes that if the author believes that his rights protected by the Constitution have been violated by a domestic law, he can petition the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic to review the constitutionality of the particular law.

Author's comments on the State party's observations

5.1 In a letter of 2 May 2014, the author responded to the observations of the State party. He notes that, at the time of his arrest on 6 June 2009, article 110 of the Criminal Procedure Code provided a blanket prohibition of arrest for crimes carrying a potential sentence of up to three years in prison. The possibility of bail was introduced by an amendment of 7 August 2009.

5.2 The author submits that, although it is stated in the 6 June 2009 decision of the Pervomaisky district court sanctioning his arrest that he had a lawyer at the hearing, no lawyer or prosecutor was present at the time. The author notes that he was not given a copy of the Pervomaisky district court's decision or the prosecutor's decision officially charging him with crimes, in violation of domestic law. These violations were raised by the author

¹¹ Article 110, paragraph 1, of the Criminal Procedure Code of Kyrgyzstan.

¹² Ibid.

during his trial. However, the court sided with the case investigator, who testified that copies of both documents had been given to the author.

5.3 The author further submits that he has petitioned the Constitutional Chamber of the Supreme Court to find articles 384 and 387 of the Criminal Procedure Code unconstitutional because they violate his right to judicial protection, as only the prosecutor's office can reopen criminal cases based on new evidence. The author argues that since the Constitution provides for judicial protection of his rights and freedoms, domestic courts should also be able to reopen criminal cases based on new evidence, as the prosecution will never be interested in reopening a case where it has already obtained a conviction. On 7 February 2014, his petition was rejected and articles 384 and 387 of the Criminal Procedure Code were declared constitutional.

Issues and proceedings before the Committee

Considerations of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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 author's claims of ill-treatment by the State Financial Police on 4 and 6 June 2009. The author raised these allegations before national authorities, as indicated notably in the Sverdlovskiy district court verdict of 14 October 2010, and they are not refuted by the State party. The Committee notes that the court did not refer the case for further investigation. The Committee notes, however, that the author's allegations based on article 7 of the Covenant are general in nature and are not supported by any medical evidence. Based on the material before it, the Committee is not in a position to conclude that the author was subjected to treatment contrary to article 7 of the Covenant. In the absence of more precise information or documentation from the author in this respect, the Committee concludes that the author's allegations under article 7 have been insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes the author's claims concerning his incommunicado detention between 4 and 22 June 2009, the conditions of his detention at the pretrial detention facility "SIZO No. 1" in Bishkek and the alleged undue delay of his trial for over a year. The Committee observes, however, that these claims do not appear to have been raised at any point throughout the domestic proceedings. This part of the communication, raising issues under articles 10 and 14 (3) (c) of the Covenant, is accordingly declared inadmissible for failure to exhaust all domestic remedies in accordance with article 5 (2) (b) of the Optional Protocol.

6.5 The Committee further notes the author's claims in relation to the alleged lack of impartiality of domestic courts and on unfair trial. In particular, it notes the author's disagreement with the sentence against him, the assessment of his alibi and material evidence, and numerous postponements of trial due to failure of the victim and witnesses to attend court hearings. The Committee recalls that it is generally for the courts of the State party to the Covenant to review facts and evidence or to apply domestic legislation, unless it can be shown that such evaluation or application is clearly arbitrary or amounts to a manifest error or denial of justice, or that the court has otherwise violated its obligation of independence and impartiality.¹³ In the present case, the Committee observes that the material before it does not allow it to conclude that the examination of the evidence and questioning of witnesses by the court reached the threshold for arbitrariness in the

¹³ See, inter alia, *Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 8.10. See also the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26.

evaluation of the evidence or amounted to a denial of justice. Accordingly, the Committee considers that the author's claim under article 14 (1) of the Covenant is insufficiently substantiated for the purposes of admissibility and inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the author has sufficiently substantiated his remaining claims, raising issues under articles 9 (1) (2) and (4) and 14 (3) (d) of the Covenant and proceeds with its consideration of the merits.

Considerations 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 required under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim under article 9 that he was arbitrarily detained from 4 June to 24 July 2009, when his detention was finally reviewed by the Bishkek city court. The Committee observes that, at the time of his arrest, the author was suspected of only one crime that carried a maximum penalty of three years in prison, whereas article 110 of the Criminal Procedure Code allowed for a pretrial arrest only if the maximum penalty for the crime exceeded three years in prison (para. 3.2). The Committee also notes the State party's submission that in exceptional cases an arrest can also be sanctioned in cases where the penalty is less than three years if one of the following circumstances is present in the case: the suspect does not have a permanent place of residence; or his/her identity has not been established; or he/she has been hiding from law enforcement authorities or courts (para. 4.2). However, the Committee notes that the Bishkek city court later established that the author had a permanent place of residence, his identity had been established and he did not hide from or obstruct the investigation (para. 2.5). Therefore, the Committee considers that in the present case, the decision to sanction the author's arrest was not in compliance with the national law and thus was arbitrary in nature. The Committee concludes that in these circumstances, and in the absence of pertinent information or explanations from the State party, the facts as submitted amount to a violation of the author's rights as protected under article 9 (1) of the Covenant.

7.3 The Committee further notes the author's claim that the State party failed to promptly inform him of the reasons for his arrest and detention, contrary to article 9 (2) of the Covenant, and to provide him with a copy of the Pervomaisky district court decision of 6 June 2009 sanctioning his arrest for two months, hence denying him the right to appeal against his detention until 8 July 2009, contrary to article 9 (4) of the Covenant (paras 2.1–2.2 and 2.4). The Committee notes that the State party has not refuted these allegations. In the circumstances, the Committee considers that due weight must be given to the author's allegations provided that they are sufficiently substantiated. Accordingly, the Committee considers that, in the circumstances of the present case, the facts as presented by the author amount to a violation of the author's rights under article 9 (2) and (4) of the Covenant.

7.4 The Committee further notes the author's claim under article 14 (3) (d) that he was denied legal assistance at the time of his detention by the State Financial Police on 4 June 2009 and later at the Pervomaisky district court on 6 June 2009 (paras. 2.1–2.2). The Committee also notes the author's allegation that he was allowed to contact his lawyer only on 26 June 2009, i.e. 22 days after his actual detention, and this lawyer was only then able to obtain copies of his case file and appeal against his arrest (paras. 2.3–2.4). The Committee observes that it has already been established by the 24 July 2009 decision of the Bishkek city court and by the internal investigation by the Ministry of Justice in 2012 that the lawyer named in the 6 June 2009 decision of the Pervomaisky district court was not present during any of the interrogations or hearings and signed the documents *post factum* (paras. 2.2 and 2.5). In the absence of any pertinent observations from the State party, the Committee considers that in the present case the author's rights to defence as protected under article 14 (3) (d) of the Covenant have been violated.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 9 (1), (2) and (4) and 14 (3) (d) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the individuals whose Covenant rights have been violated with an effective remedy in the form of full reparation. Accordingly, the State party is obligated to, inter alia, provide Evgeny Osincev with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

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 or 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 all official languages in the State party.
