



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2335/2014\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	G.A. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Uzbekistan
<i>Date of communication:</i>	12 December 2012 (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 16 January 2014 (not issued in document form)
<i>Date of adoption of decision:</i>	2 November 2018
<i>Subject matters:</i>	Denial of a representative of the author's choice; impartiality of judges
<i>Procedural issue:</i>	Level of substantiation of claim
<i>Substantive issues:</i>	Fair trial guarantees: right to be represented by a representative of one's choice; right to be tried in one's presence; judicial independence and impartiality; right to have one's sentence reviewed; assessment of evidence
<i>Articles of the Covenant:</i>	2 (3), 9 (2) and (3) and 14 (1), (3) and (5)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (a) and (b)

1.1 The author of the communication is G.A., a national of Uzbekistan born in 1965. He claims that the State party has violated his rights under articles 9 (2) and (3) and 14 (1), (3) and (5), read in conjunction with article 2 (3), of the Covenant. The Optional Protocol entered into force for the State party on 28 December 1995. The author is not represented by counsel.

\* Adopted by the Committee at its 124th session (8 October–2 November 2018).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, Margo Waterval and Andreas B. Zimmermann.

\*\*\* An individual opinion by Committee member Olivier de Frouville (dissenting) is annexed to the present decision.



1.2 On 16 January 2014, the Committee issued a request for interim measures of protection and invited the State party to make sure that no reprisals were taken against the author and his family, witnesses and representatives as a result of the submission of the communication, and that he was protected during the period of consideration of the communication by the Committee.

#### **The facts as submitted by the author**

2.1 Since 2005, the author had worked as head of the Andizhan regional Department of Justice. On 15 July 2008, Andizhan Regional Court found him guilty of multiple counts of bribery, larceny, forgery in office, abuse of office and administrative inaction, and sentenced him to ten and a half years' imprisonment and a fine.

2.2 On 8 October 2008, the author requested that his wife, who is not a lawyer, be appointed to represent him on appeal, along with his three professional lawyers. He referred to articles 24 and 49 of the Criminal Procedure Code and to ruling No. 17 of 19 December 2003 of the Plenum of the Supreme Court, relating to the right to defence. The Court ruling provides that close relatives, including spouses, can be admitted as representatives in criminal proceedings, that the court concerned shall issue a decision to that effect immediately upon presentation of a document confirming family relations, and that neither the investigator nor the judge can refuse to admit a representative chosen by the suspect or accused. On 10 October 2008, the author's wife submitted such a request to the appellate court. The author claims that the appellate court disregarded both requests because it did "not need representatives who cannot be manipulated".

2.3 On 22 October 2008, the appellate chamber of Andizhan Regional Court upheld the author's conviction on appeal. The author was represented by his three professional lawyers. Judge H. presided over the appeal panel and Judge M. participated in the proceedings. In the course of the appellate proceedings, the author challenged Judge H., who came to see the author, on the ground that the author had removed the Judge H.'s sister, M., from her position as the head of the civil registry office in Andizhan and had refused Judge H.'s request to reinstate her. The author also challenged Judge M. on the ground that the author had downgraded his nephew, M. The author claimed that he had reasons to doubt the impartiality and independence of the two judges. He claims that both his requests were rejected.

2.4 Between November 2008 and July 2009, the author and his wife filed several complaints with courts at different instances in Uzbekistan, challenging the author's conviction and claiming a violation of his rights to defence on the ground that the court had not allowed his wife to represent him on appeal. They also claimed that the court of first instance had delivered two divergent convictions, noting that the author's copy of the conviction was different from the copy contained in his criminal case file. Their complaints were forwarded to the Supreme Court and the Prosecutor General's Office for consideration. Between December 2008 and July 2009, the Supreme Court confirmed the author's conviction and upheld the court decisions as substantiated, without addressing the alleged violation of the author's right to defence. On 6 August 2009, the Prosecutor General's Office wrote to the author's wife, informing her that his guilt was confirmed by evidence. However, the first-instance court made a mistake in finding the author guilty under article 209 (2) (b) of the Criminal Code, which was not indicated in his indictment. Therefore, the Prosecutor General entered a protest with the Supreme Court under the supervisory review procedure in order to have article 209 (2) (b) of the Criminal Code removed from the author's conviction.

2.5 In the meantime, on 6 April 2009, the author and his wife wrote to the Chairman of the Supreme Court, asking him to submit the author's case for supervisory review to the Court. On 3 July and 20 August 2009, the author and his wife requested the Supreme Court to admit her as his representative in the supervisory review proceedings. The author claims that the Supreme Court has not answered their requests.

2.6 On 20 August 2009, the Supreme Court, presided over by Judge U. and with the participation of Judge R., accepted the Prosecutor General's protest to alter the author's

sentence by removing article 209 (2) (b) of the Criminal Code from his conviction.<sup>1</sup> An assistant Prosecutor General participated in the hearing. The author claims that he did not receive a copy of the Prosecutor General's protest motion, that he was not given an opportunity to study the case file, that the Court did not consider his arguments, that he had not been informed of the date and time of the Court hearing, that his lawyers were not summoned to the hearing, and that the Court did not verify whether the author had been duly informed of the hearing, nor why his lawyers were not present. He further claims that he learned about the hearing only in October 2009, when he received a copy of the Supreme Court's decision. He refers to ruling No. 17 of the Plenum of the Supreme Court, which provides in particular that the right to defence should be ensured at every stage of criminal proceedings and that the court should inform the parties concerned about complaints and protests, provide them with a copy thereof and explain their right to file counterclaims. Courts must notify the convict and his or her counsel about any supervisory review hearing. Holding a supervisory review hearing in the absence of counsel – if counsel was not duly informed thereof, thus depriving him or her of any opportunity to attend it – amounts to a serious violation of the Criminal Procedure Code.

2.7 Between 2009 and 2011, the author submitted a number of complaints about the Supreme Court decision, to different authorities. He claimed that his wife had not been admitted to represent him before the Supreme Court, despite specific requests, that he had not received a copy of the Prosecutor General's protest motion, that he had not been given an opportunity to study the case file, that the Supreme Court had not considered his arguments, and that neither he nor his lawyers had been informed of the date and time of the court hearing. The author provides several replies from the Supreme Court, signed by Judge U. and Judge R., in which his complaints were dismissed as unsubstantiated.

2.8 The author claims that he has exhausted all available domestic remedies. He requests the Committee to put an end to the situation of denial of justice in his regard, to have his criminal case reviewed publicly by a competent, independent and impartial tribunal, to restore his right to defence and to order compensation and damages. He also requests the Committee to issue interim measures to protect him from the risk of torture while he is imprisoned.

### **The complaint**

3.1 The author claims that the refusal to appoint his wife as his representative before the appeal court and the Supreme Court, together with the failure of the authorities to address his complaints in that respect, amounts to a violation of his rights under article 14 (3), read in conjunction with article 2 (3), of the Covenant.

3.2 The author further alleges a violation of article 14 (1) and (3), read in conjunction with article 2 (3), of the Covenant, on the grounds that he was not informed of, or summoned to, the hearing of the Prosecutor General's protest before the Supreme Court, that he did not receive a copy of the protest motion and was not given an opportunity to study his criminal case file, and that the hearing was held in his absence and in the absence of his lawyers, while an assistant Prosecutor General was present.

3.3 The author also claims a violation of the above-mentioned provisions of the Covenant on the ground that appeal court Judges H. and M. and Supreme Court Judge U. lacked independence and impartiality. He stresses that Judges H. and M. did not recuse themselves from consideration of his case, despite the fact that he challenged their selection. He argues that Judge U. should not have participated in the consideration of the Prosecutor General's protest motion because the judge had previously dismissed the author's supervisory review applications as unsubstantiated.

3.4 Lastly, the author claims a violation of article 14 (5) of the Covenant, on the ground that his applications for supervisory review were rejected by Judges U. and R., who participated in the consideration of the Prosecutor General's protest motion.

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<sup>1</sup> Forgery in office is punishable under article 209 (2) of the Criminal Code. Article 209 (2) (b) refers to forgery "in the interests of an organized group".

**State party's observations**

4.1 In a note verbale dated 15 April 2014, the State party submitted its observations on the merits of the communication. It rejects the author's allegations as unsubstantiated. It submits that, although the author did not plead guilty, his guilt is confirmed by a multitude of evidence, including statements from victims and witnesses, expert evidence and records on file. The evidence was duly assessed by the domestic courts. The State party submits that the court proceedings were held in full compliance with the Criminal Procedure Code and ruling No. 17 of the Plenum of the Supreme Court.

4.2 Concerning the author's claim under articles 14 (3) and 2 (3) of the Covenant, the State party submits that the author was legally represented before the domestic courts: two professional lawyers represented him before the first-instance court and three professional lawyers before the appellate court. The fact that his spouse was not admitted to represent him, along with the three professional lawyers, does not amount to a violation of his right to defence.

4.3 Concerning the author's claim under article 14 (1) and (3), read in conjunction with article 2 (1) and (3), of the Covenant, the State party submits that the author's supervisory review appeal, prepared in March 2009 with the assistance of his three lawyers, was considered by the Supreme Court in August 2009. Having considered the appeal, the Prosecutor General's Office submitted a supervisory review protest motion to the Supreme Court on 4 August 2009. On 20 August 2009, the Supreme Court, presided over by Judge U., considered the protest motion in order to verify the lawfulness and substantiation of the author's conviction as upheld on appeal. On 20 August 2009, the Supreme Court amended the author's conviction by removing article 209 (2) (b) of the Criminal Code therefrom. The State party adds that supervisory review proceedings are an additional safeguard to ensure lawfulness and the rights of citizens and are an effective means to strengthen the quality of the justice system.

4.4 Concerning the author's claim about the lack of independence and impartiality of the court contrary to article 14 (1) of the Covenant, the State party notes that Judge U. indeed examined several complaints from the author's wife and upheld the relevant court decisions. The same judge assessed the evidence on the basis of his inner conviction after a thorough, comprehensive, complete and objective analysis of all circumstances of the author's case and in compliance with the law. Based on this assessment, the author's conviction was amended. The State party stresses that there were no grounds to recuse Judge U. under article 76 of the Criminal Procedure Code.

4.5 Concerning the author's claim under article 14 (5), the State party refers to article 519 (4) of the Criminal Procedure Code and submits that the Plenum of the Supreme Court considers cases on protests against appellate, cassation and supervisory review findings of Supreme Court panels. The criminal panel of the Supreme Court did not act as an appellate or supervisory review instance in relation to the author. Therefore, there was no ground to remit the author's case to the Presidium of the Supreme Court for consideration.

4.6 In the light of the above, the State party reiterates that the author's allegations should be dismissed as unsubstantiated.

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

5.1 On 20 May 2014, the author submitted comments on the State party's observations. He submits that the witnesses and victims testified under pressure and that the remaining evidence in the case file was "fabricated" or collected in violation of the Criminal Procedure Code. The domestic courts rejected more than 50 motions from the author to that effect. He claims that the court proceedings were held in violation of the Criminal Code and Criminal Procedure Code. In particular, the first-instance court delivered two different decisions, one for the author and the other for the case file. However, after verification, the Supreme Court established that the decisions were identical. The author requests the State party to submit the decision from the case file.

5.2 The author maintains that his right to defence was violated. With reference to ruling No. 17 of the Plenum of the Supreme Court, he argues that he was entitled to invite several

representatives of his choosing and that neither the investigator nor the judge had the authority to refuse him that. According to the author, while representatives are independent, lawyers “are accountable to State officials and can therefore be manipulated”.

5.3 The author reiterates his claim about the lack of independence and impartiality of the court and expresses concern that the State party did not address his claim in relation to Judges H. and M. Judge U. refers to article 76 (1) (3) of the Criminal Procedure Code, which provides that other circumstances that raise doubts about a judge’s objectivity and impartiality can preclude his or her participation in criminal proceedings. The author claims that the fact that, before participating in the Supreme Court hearing on 20 August 2009, Judge U. had rejected his complaints in relation to his conviction as unsubstantiated is a valid ground for casting doubts on his objectivity.

5.4 The author reiterates his claim about a violation of his rights in the framework of the supervisory review proceedings, in particular because neither his lawyers nor his representative were present at the Supreme Court hearing of 20 August 2009.

5.5 The author challenges the State party’s observation that there were no grounds to remit the author’s case to the Presidium of the Supreme Court. He claims that the Supreme Court did consider his case on supervisory review on 20 August 2009. He lists the authorities entitled to enter protests regarding criminal proceedings under article 511 of the Criminal Procedure Code, including the President and Vice-President of the Supreme Court, the Prosecutor General and his or her deputies. He claims that those authorities should have examined his complaints against the Supreme Court decision of 20 August 2009.

5.6 The author requests the Committee to order his rehabilitation, to request compensation, including for all damage suffered, to order that his rights be restored and to request that the State party improve its policy to ensure the full independence of judges and lawyers from State authorities.

#### **State party’s additional observations**

6.1 In a note verbale of 4 August 2014, the State party addressed the author’s comments. It rejects as unsubstantiated his allegations that the victims and witnesses testified under pressure, on the ground that they had not claimed that to be the case in the course of the criminal proceedings. Furthermore, six victims were also civil claimants in the proceedings against the author. Expert conclusions and other written evidence also confirmed the author’s guilt.

6.2 The State party further rejects the author’s claim about the two allegedly divergent convictions. It submits that, based on a complaint by the author’s counsel N. in that connection, an investigation was conducted. On 28 January 2009, the claim was rejected as unsubstantiated.

#### **Additional comments from the author**

7.1 On 22 September 2014, the author reiterated his claims. Regarding the two allegedly divergent versions of court decisions, he adds that the decision in his criminal case file includes two additional counts of bribery in the narrative section, unlike the copy of the decision in his possession.

7.2 On 14 March 2015, the author submitted that the State party had refused to cooperate with the Committee because it had failed to acknowledge the violation of his rights. The author also submits that neither he nor his family were duly informed of the reasons for his initial arrest and that the preliminary investigation was suspended, in violation of article 9 (2) of the Covenant. He further claims that the preliminary investigation was protracted, in violation of article 9 (3) of the Covenant, that he never confessed guilt, and that the fact that the narrative part of his conviction mentions that he “regrets his actions” renders the conviction unlawful and in violation of article 14 (3) (g) of the Covenant. He submits that the appellate court rejected his motion to summon the two relatives of Judges M. and H., in violation of article 14 (3), and that the court proceedings were therefore not adversarial. He also claims a violation of his rights under article 17 of

the Covenant, because several pieces of correspondence between him and the Committee were allegedly intercepted by the authorities.

7.3 On 8 July 2015, the author submitted copies of the two allegedly divergent court decisions. On 7 September and 25 November 2015, the author reiterated his claims.

#### **State party's further observations**

8.1 In notes verbales of 10 February, 2 July, 28 August and 20 November 2015, the State party submitted further observations reiterating its previous position. It rejected the author's new allegations under article 9 (1) and (3) of the Covenant. Regarding the author's claims under article 14 (3) (g), the State party notes that the operative part of the conviction does not mention "regrets", as allegedly expressed by him.

8.2 The State party submits that the first-instance and appellate courts granted several of the challenges submitted by the author and rejected others, with an indication of reasons for those decisions. The appellate court considered the author's two challenges to Judges M. and H. and issued three separate procedural decisions rejecting the claims as unsubstantiated. The appellate court discarded the author's allegation that the judges were not independent since they were relatives of the two people whom he had professionally downgraded in the past, because the relatives were not involved in the criminal proceedings against the author.

8.3 The author's motion to appoint his wife as his representative was rejected on the ground that the author was represented by three professional lawyers before the appellate court, whereas his wife had no legal background. Referring to article 49 (3) of the Criminal Procedure Code, the State party argues that appointing relatives as representatives is within the remit of the court.

8.4 The author's motion to hear a number of witnesses was granted by the appellate court, and those witnesses were questioned during the court hearing. The author's motion to study the transcript of the appellate court hearing was also granted.

8.5 With reference to article 479 (4) of the Criminal Procedure Code, the State party submits that there is no obligation for the convicted person and his representatives to participate in the supervisory review hearing and that their failure to attend it, in the case that they were duly notified thereof, does not preclude the court from considering the matter.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

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

9.2 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.

9.3 The Committee notes that it is not disputed by the State party that the author has exhausted all effective domestic remedies available to him. In the circumstances, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

9.4 The Committee notes the author's claim under article 14 (1) and (3), read in conjunction with article 2 (3), of the Covenant, that his right to defence was breached because his wife was not admitted to represent him before the appellate and supervisory review courts, along with his professional lawyers. The Committee notes the State party's submission that the author was represented by three professional lawyers before the appellate court, whose assistance he never challenged as being ineffective, that his wife had no legal background and attended every hearing of the appellate court, and that appointing a representative from among relatives remains the prerogative of domestic courts, in accordance with domestic law. The Committee further notes the author's explanation that

he believed that all lawyers, including those who represented him, were accountable to State officials, and that only representatives from among relatives, such as his wife, were truly independent and could represent him before international organizations.

9.5 The Committee recalls its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, to the effect that article 14 (3) (d) of the Covenant contains the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing.<sup>2</sup> The Committee notes that the material submitted by the parties does not indicate that the three professional lawyers were not privately retained by the author or on his behalf but were appointed by, or with the acquiescence of, the State party's authorities. The Committee also notes that the author has not explained the added value of having his wife as counsel before the appellate or supervisory review courts and how, precisely, the fact that she did not represent him affected his defence and impacted on the outcome of the proceedings before those instances or on the administration of justice. The Committee further observes that the author has not substantiated the contention that the domestic law provisions restricting the admission of relatives as representatives at the discretion of the domestic courts were unreasonable.<sup>3</sup> In the circumstances, the Committee considers that the author has failed to substantiate that part of the communication and declares it inadmissible under article 2 of the Optional Protocol.

9.6 The Committee notes the author's claim that the supervisory review hearing in the Supreme Court on 20 August 2009, which followed a protest motion by the Prosecutor General, was held in violation of article 14 (1) and (3) of the Covenant, as neither he nor his lawyers were present. The Committee notes the author's submission that, on 6 August 2009, the Prosecutor General notified the author's wife that he had submitted a supervisory review protest in order to rectify an error made by the lower courts and to remove the count under article 209 (2) (b) of the Criminal Code from the author's conviction. The Committee observes, based on the material made available to it, that the purpose of the supervisory review hearing was to enter a technical correction to the author's conviction, rather than to examine his case on matters of fact or law and make a new assessment of the issue of guilt or innocence.<sup>4</sup> It also observes that the author was informed of the contents of the Prosecutor General's protest motion and the outcome of the hearing. Taking into account that the author has not provided any further explanation as to why his absence or the absence of his representatives at the supervisory review hearing affected his trial or his rights, and given the nature and the outcome of the supervisory review hearing, the Committee considers that the author has failed to substantiate that part of the communication and declares it inadmissible under article 2 of the Optional Protocol.

9.7 The Committee notes the author's claim, under article 14 (1) and (3), read in conjunction with article 2 (3), of the Covenant, that Judges H., M. and U. lacked independence and impartiality. The Committee notes the author's explanation that Judges H. and M. of the appellate court wanted to take revenge on him because he had downgraded their relatives in their duties. It also notes his explanation that Judge U. had dismissed his applications for supervisory review of his conviction and therefore should not have participated in the supervisory review hearing of 20 August 2009. The Committee takes note of the State party's explanation that the appellate court considered the author's challenges to Judges M. and H. and rejected them as unsubstantiated, and that nothing demonstrated that the appellate court had protracted the consideration of the case. It also notes that the State party has acknowledged that Judge U. thoroughly examined several complaints from the author and his wife and dismissed them as unsubstantiated. Without clear evidence to the contrary, the Committee is not in a position to come to a factual finding that refutes that of the domestic courts. Furthermore, the author did not provide a basis on which the Committee can hold that the fact that Judge U. considered more than one supervisory review of his case – one of them resulting in one of the convictions of the author being overturned – is a violation of article 14. In the light of the above

<sup>2</sup> See para. 37 of the general comment.

<sup>3</sup> *V.P. v. Belarus* (CCPR/C/122/D/2166/2012), para. 7.7.

<sup>4</sup> See, *a contrario*, *Dorofeev v. Russian Federation* (CCPR/C/111/D/2041/2011), para. 10.6, and *Kostin v. Russian Federation* (CCPR/C/119/D/2496/2014), para. 7.2.

considerations, and in the absence of any further information or explanations of pertinence, the Committee considers that the author has failed to substantiate this part of the communication and declares it inadmissible under article 2 of the Optional Protocol.

9.8 The Committee notes the author's claim that his applications for supervisory review of his conviction were rejected, in violation of article 14 (5) of the Covenant. It is clear from the record that the author's case was considered at least once on appeal. In the absence of any further information in that connection, the Committee finds the above-mentioned claim inadmissible under article 2 of the Optional Protocol, for insufficient substantiation.

9.9 The Committee notes the author's further claims under article 14 of the Covenant, raised in his subsequent submissions to the Committee, regarding the manner in which the courts examined evidence and witnesses during the trial. It observes, in particular, the author's disagreement with his sentence, the assessment of material evidence, and his allegations that two divergent court decisions were issued in his case and that State authorities coerced witnesses and victims to testify against him. The Committee notes that the State party has rejected the author's allegations as unsubstantiated, providing detailed reasoning regarding every point raised by the author and a reference to the relevant decisions by its domestic authorities. The Committee observes, in particular, the State party's observations to the effect that the evidence was duly assessed by the domestic courts, that the author's conviction was grounded and issued after a thorough, comprehensive, complete and objective analysis of all the circumstances of his case, that the author's motions to hear a number of witnesses relevant to his case were granted by the domestic courts and these witnesses have in fact been questioned, that the author's motions to hear the two relatives of Judges H. and M. were rejected as irrelevant, mainly because they were unaware of the exact circumstances in the author's case, that an investigation conducted further to the author's claim regarding the allegedly divergent convictions concluded that his claim lacked substantiation, that no victims or witnesses claimed to have been coerced to testify by the domestic authorities and that six victims acted as civil claimants in the proceedings against the author.

9.10 The Committee further recalls its case law according to which it is for the courts of States parties to evaluate the facts and the evidence or the application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>5</sup> In the present case, the Committee observes that the information and the material before it do not allow it to conclude that the author's trial suffered from any such defects. The Committee therefore declares the author's claims under article 14 of the Covenant insufficiently substantiated and thus inadmissible under article 2 of the Optional Protocol.

9.11 The Committee finally considers that the author has failed to substantiate his remaining claims under articles 9 (2) and (3) and 17 of the Covenant raised in his subsequent submissions and, in the absence of any further pertinent information on file, it declares that part of the communication inadmissible under article 2 of the Optional Protocol.

10. The Committee therefore decides:

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

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<sup>5</sup> See, inter alia, *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6; and *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.



## Annex

[Original: French]

### Individual opinion of Committee member Mr. Olivier de Frouville (dissenting)

1. I am not in agreement with the conclusion reached by the Committee in paragraph 9.7 of its Views, with regard to the author's claims under article 14 of the Covenant, alleging a lack of impartiality on the part of appeal court Judges H. and M.

2. The author explains clearly the reasons for his doubts as to the impartiality of the two judges. Since 2005, the author had worked as head of the Andizhan regional Department of Justice and in that capacity was responsible for taking human resources decisions with respect to persons employed under his authority. It was in that capacity that he removed Judge H.'s sister from her position as the head of the civil registry office in Andizhan and, later, when Judge H. went to see the author to request his sister's reinstatement, that he refused the request. In addition, the author downgraded Judge M.'s nephew (para. 2.3). His subsequent challenges to the two judges appear to be justified in the light of the Committee's case law,<sup>1</sup> and also that of other human rights courts,<sup>2</sup> as regards objective impartiality. The State party submits that the appellate court considered the author's two challenges to Judges M. and H. and rejected them as unsubstantiated in three separate decisions on the ground that the judges' relatives were not involved in the criminal proceedings against the author (para. 8.2).

3. I do not see how the Committee can be satisfied by such an explanation, which demonstrates the appellate court's failure to observe the principle of objective impartiality. That principle requires judges not only to be impartial, but to be seen as impartial by the public at large, as in the saying, "Justice must not only be done, but must also be seen to be done." The "test" in this case consists in asking whether the concerns expressed by the author are objectively justified. The facts are not contested by the State party: the author took action against the two judges' relatives that negatively affected their careers. Therefore, the question is not whether the judges' relatives were "involved in the criminal proceedings", but whether, given the context, the author had legitimate reason to believe that the two judges (one of whom presided over the appeal panel) might lack impartiality with respect to him.

4. When the facts are not challenged, the Committee cannot apply the principle of subsidiarity, according to which national courts bear the primary responsibility for assessing facts and evidence. In the case at hand, the issue is neither one of the assessment of facts nor the assessment of evidence, but an erroneous interpretation of the principle of impartiality, as enshrined in article 14 of the Covenant, which the Committee should penalize by finding that a violation has taken place.

<sup>1</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para.21. See also the Committee's Views adopted in *Karttunen v. Finland*, (CCPR/C/46/D/387/1989); *Jenny v. Austria* (CCPR/C/93/D/1437/2005), paras. 9.3 and 9.5; and *Lagunas Castedo v. Spain* (CCPR/C/94/D/1122/2002), paras. 9.6 and 9.7.

<sup>2</sup> See, for example, the judgment of the European Court of Human Rights in *Piersack v. Belgium*, 1 October 1982, application No. 8692/79, in particular paragraph 30. See also *Hauschildt v. Denmark*, 24 May 1989, application No.10486/83, para. 48; and *Kyprianou v. Cyprus* [GC], application No. 73797/01, 15 December 2005, paras. 123 to 128.