



# 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 communications Nos. 2542/2015 and 2543/2015\*, \*\*

<i>Communications submitted by:</i>	Dilnar Insenova (represented by counsel, Bakhytzhan Toregozhina)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	2 September 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 22 January 2015 (not issued in document form).
<i>Date of adoption of Views:</i>	26 July 2019
<i>Subject matter:</i>	Sanctioning of the author for participation in a peaceful assembly and for expressing her opinion; fair trial.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims.
<i>Substantive issues:</i>	Freedom of opinion and expression; freedom of assembly; fair trial.
<i>Articles of the Covenant:</i>	14 (1), 14 (3) (d) and (g), 19 (2) and 21
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1.1 The author of the two communications is Dilnar Insenova, a citizen of Kazakhstan, born in 1972. She claims that Kazakhstan violated her rights under articles 14 (1), 14 (3) (d) and (g), 19 (2) and 21 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for Kazakhstan on 30 September 2009.

\* Adopted by the Committee at its 126th session (1–26 July 2019).

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



1.2 On 8 July 2019, pursuant to rule 97 (3) of the Committee's rules of procedure, the Committee decided to join the two communications for decision in view of their substantial factual and legal similarity.

### **The factual background**

#### *Communication No. 2542/2015*

2.1 On 5 September 2013 at around 6 p.m., the author, an unemployed mother of three minor children, was apprehended by the police for distributing invitations for a meeting of homeless people, scheduled for 9 September 2013. After her apprehension the author requested a lawyer. Her request was ignored. On 8 September 2013, the specialized inter-district administrative court of Karasaysky district, Almaty region, found her in violation of article 373 (1) of the Code of Administrative Offences (violation of the legislation on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations). The Court found that the author was distributing invitation for an unauthorized meeting and imposed on her a fine of 10 monthly calculation indices (17,310 tenge).<sup>1</sup>

2.2 On 16 September 2013, the author submitted an appeal to the Almaty regional court. She claimed that the meeting scheduled for 9 September 2013 was to be held in closed premises, for which authorization by the local authorities was not necessary and that her right to peaceful assembly, as guaranteed by the Constitution of Kazakhstan and international treaties ratified by it, including the Covenant, was violated by the court decision of 8 September 2013. Her appeal was rejected on 3 October 2013. The Almaty regional court confirmed the finding of the first instance court that she had participated in the organization of an unauthorized assembly. The Court found that the fine imposed on the author was within the limits of the sanctions set out in article 373 (1) of the Code of Administrative Offences. On 8 October 2013, the author submitted a request to the Almaty Regional Prosecutor to initiate a supervisory review of the decision of the specialized inter-district administrative court. Her request was rejected on 5 November 2013. The author submitted a supervisory review request to the Prosecutor General on 22 January 2014. She claimed that in addition to her right to peaceful assembly, her right to freedom to impart information, under article 19 of the Covenant, had been violated. The Prosecutor General referred to the Law of 17 March 1995 on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations and to the fact that the law obliges organizers of public events to request authorization for an event from the local executive authorities, which had not been done in the author's case. The Prosecutor General rejected the author's request on 17 July 2014.

#### *Communication No. 2543/2015*

2.3 On 15 February 2014, the author participated in a spontaneous assembly in protest of a sudden 30 per cent devaluation of the national currency of Kazakhstan. On the same date at around 6.30 p.m. she was again apprehended by the police. Upon her apprehension, she requested a lawyer but was not provided with one. On 15 February 2014, the specialized inter-district administrative court of Almaty found her in violation of article 373 (1) of the Code of Administrative Offences and imposed on her a fine of 3 monthly calculation indices (5,556 tenge).<sup>2</sup>

2.4 On 25 February 2014, the author appealed the decision of the specialized inter-district administrative court to the Almaty city court. Referring to the provisions of the Constitution and to articles 19 and 21 of the Covenant, the author maintained that she had been arrested for expressing her opinion and participating in a peaceful demonstration. The author claimed in her appeal that upon her apprehension she had requested a lawyer but was not provided with one. On 6 March 2014, the city court rejected her appeal, relying on article 2 of the Law of 17 March 1995.

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<sup>1</sup> Approximately US\$ 113 at the time.

<sup>2</sup> Approximately US\$ 30 at the time.

2.5 On 31 March 2014, the author submitted a request to the Almaty City Prosecutor to initiate a supervisory review of the decision of the administrative court. On 5 May 2014, she submitted a similar request to the Prosecutor General. Both requests were denied on 11 April and 14 July 2014, respectively.

### **The complaint**

3.1 The author claims in regard to both communications that in violation of article 14 of the Covenant, the domestic courts did not take into account her rights under articles 19 and 21 of the Covenant when sanctioning her for expressing her opinion and taking part in a peaceful assembly. She also claims that despite her request, she was not provided with a lawyer when she was apprehended, in violation of article 14 (3) (d) of the Covenant. The author claims that her right to defend herself in the presence of a lawyer under article 14 (3) (d) was violated. She also claims violation of her rights under article 14 (3) (g) of the Covenant.

3.2 In communication No. 2542/2015 the author claims that her rights under articles 19 (2) and 21 of the Covenant were violated. In communication No. 2543/2015, she claims violation of article 21 of the Covenant.

3.3 The author requests that those responsible for the violation are brought to justice and asks for compensation for the moral and material damage caused to her (the amount of fines) and for legal expenses. She asks the Committee to request that the State party adopt measures to eliminate the existing limitations to the right to peaceful assembly and to free expression in its legislation and adopt measures to eliminate violations of the right to a fair trial under article 14 (3) (d) and 14 (3) (g), of the Covenant; and to urge the State party to guarantee that peaceful protests are not followed by unjustified interference by the State authorities and the prosecution of participants.

### **State party's observations on admissibility and the merits**

#### *Communication No. 2542/2015*

4.1 In a note verbale dated 17 March 2015, the State party submitted its observations on communication No. 2542/2015, claiming that the author had not requested the Prosecutor General to submit a protest in her case to the Supreme Court and had thus failed to exhaust domestic remedies.

4.2 On 30 July 2015, the State party submitted its observations on the merits of the communication. Concerning the author's allegations under article 14 of the Covenant, the State party submits that she had equal rights with other participants of the process and that her appeals have been considered by higher courts.

4.3 The State party recalls that the rights enshrined in articles 19 and 21 of the Covenant are subject to certain limitations. While stating that freedom of peaceful assembly is not prohibited in Kazakhstan, the State party explains that there is a certain procedure to follow in order to carry out an assembly in a safe and orderly manner. The procedure is regulated by the law of 17 March 1995 on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations. According to article 2 of this law, a request for authorization of a public event should be submitted to the respective local authorities 10 days before the planned event. The local authorities are obliged to respond to the request within five days of the date for which the planned public event is scheduled.

4.4 The State party addresses the author's argument regarding the private nature of the venue for the event of 9 September 2013 and the inapplicability of the requirement to seek authorization from the authorities in such a case. The State party explains that the law only exonerates professional and public associations (even unregistered ones) from seeking authorization for a public event held in closed private facilities. The meeting for which the author was distributing invitations was open to the general public and was to be held at the Dzharlygapov sports complex in Almaty. That facility includes closed premises and an open stadium. The administration of the facility denied receiving any requests for public events to be held on 9 September 2013.

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

*Communication No. 2543/2015*

4.6 On 23 December 2015, the State party submitted observations on communication No. 2543/2015. As for the author's allegations under article 14 of the Covenant, the State party submits that she enjoyed all the procedural guarantees set out in domestic administrative legislation. The State party contests the author's claim that she requested a lawyer upon apprehension or in the first instance court.

4.7 The State party submits that no request was submitted to the local authorities for authorization of the public event of 15 February 2014, in which the author participated. The event in question presented a threat to public order and safety and to the work of public infrastructure in such a large city as Almaty.

4.8 The State party submits that the right to peaceful assembly is guaranteed in the national Constitution and laws. The legislative provisions in place aim to regulate and not restrict public events. The State party explains the provisions of the law on public events of 17 March 1995 and asserts that national legislation is fully in line with the principles set out in article 21 of the Covenant concerning possible restrictions on the right to peaceful assembly. In the light of the above arguments, the State party submits that the author's claims under articles 14 and 21 of the Covenant are unsubstantiated on the merits.

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

*Communication No. 2542/2015*

5.1 On 8 April 2015, the author responded to the State party's observations concerning her failure to exhaust domestic remedies in communication No. 2542/2015. She claims that despite the ineffectiveness of the procedure to request that the Prosecutor General submit a protest to the Supreme Court, she did, nevertheless submit such a request to the Office of the Prosecutor General.

5.2 On 15 September 2015, the author submitted comments to the State party's observations on the merits in communication No. 2542/2015. She repeats her claim that she did not need authorization to hold a meeting in a private facility such as the sports facility in question. She claims that sanctioning her for the organization of an unauthorized public event was unlawful and that such preventive measures against the organizers served as a deterrent for others and prevented them from expressing their opinions or dissatisfaction. The author refers to the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association after his visit to Kazakhstan in January 2015, in which he criticized the restrictive approach to freedom of assembly in the country.<sup>3</sup> The author puts forward proposals on how to improve the legislation of the State party on the organization of public events. The author claims that the State party continues to adopt an aggressive policy towards organizers of public events and their participants.

*Communication No. 2543/2015*

5.3 On 31 January 2016, the author submitted her comments to the State party's observations on communication No. 2543/2015. She contests the State party's statement that its legislation is in conformity with the principles of article 21 of the Covenant. She claims that the requirement to request authorization from the local executive authorities to hold a public event deprives people of their right to peaceful assembly.

5.4 Regarding the violation of article 14 (3) (d), she claims that the police officers are obliged to ask the person they have apprehended whether he or she needs a lawyer. That was not done in her case. However, knowing her rights she did request legal assistance, to no avail.

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<sup>3</sup> A/HRC/29/25/Add.2.

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### **Additional correspondence by the parties**

#### *The State party*

6.1 On 5 November 2015, the State party, in essence, reiterated its initial observations on the merits of communication No. 2542/2015.

6.2 In a note verbale dated 15 March 2016, the State party stated that it adhered to its initial observations in both communications. The State party repeats its statement that the author did not submit a request for a lawyer upon apprehension or in the first instance court.

#### *The author*

7.1 On 18 November 2015 the author submitted additional comments in communication No. 2542/2015, repeating the facts of her original submission and claiming that during the two previous years she had been sanctioned by the courts several times for participating in peaceful protests. She claims that the State party continues its practice of restriction of peaceful assemblies through administrative fines and arrests for up to 15 days.

7.2 On 16 March 2016, the author responded, reiterating her previous claims in both communications.

### **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 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the author's claim that all available domestic remedies have been exhausted. It also notes the State party's observation on communication No. 2542/2015, that the author did not request the Prosecutor General to initiate supervisory review proceedings before the Supreme Court and has thus failed to exhaust domestic remedies. On a general note, the Committee recalls its jurisprudence, according to which a petition to a court or to the prosecutor's office requesting a review of court decisions that have taken effect and depend on the discretionary power of a judge or a prosecutor, constitutes an extraordinary remedy and that the State party must show that there is a reasonable prospect that such requests would provide an effective remedy in the circumstances of the case.<sup>4</sup> In the present case, the Committee notes that on 22 January 2014 the author did submit a request to the Office of the Prosecutor General for the initiation of a supervisory review. Her request was rejected on 17 July 2014. Accordingly, the Committee considers that domestic remedies have been exhausted by the author and that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

8.4 The Committee notes the author's claim that her rights under article 14 (1) of the Covenant have been violated because the domestic courts did not take into account her claims under articles 19 and 21 of the Covenant. In the absence of any other pertinent information in that respect, however, the Committee considers the author has failed to sufficiently substantiate that claim for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.5 The Committee takes note of the author's claim that her rights under article 14 (3) (d) of the Covenant have been violated because she did not have access to a lawyer when she was arrested on 3 September 2013, and that her right to defend herself in the presence of a

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<sup>4</sup> See *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3, and *Dorofeev v. the Russian Federation* (CCPR/C/111/D/2041/2011), para. 9.6.

lawyer was violated. The Committee notes, that the author was accused of an administrative offence, while article 14 (3) (d) provides guarantees in cases regarding the determination of criminal charges against individuals. The Committee, however, recalls that although criminal charges relate in principle to acts declared to be punishable under domestic criminal law, the concept of a “criminal charge” has to be understood within the meaning of the Covenant.<sup>5</sup> According to paragraph 15 of the Committee’s general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the notion may also extend to sanctions that, regardless of their qualification in domestic law, must be regarded as penal in nature because of their purpose, character or severity. In the present cases, the author was apprehended, brought to trial, found guilty and sanctioned with a considerable fine for peacefully imparting information and participating in a public event. The Committee observes that such a penalty was preceded by a deprivation of liberty, albeit brief, and had the aim of punishing the author for her actions and serving as a deterrent for future similar offences – objectives analogous to the general goal of the criminal law.<sup>6</sup> In that light, the Committee finds that the author’s claim falls under the protection of article 14 (3) (d) of the Covenant. The Committee notes, however, that the author has not provided any details or documents to substantiate her claim that she was denied a lawyer in connection with the proceedings against her and finds them inadmissible under article 2 of the Optional Protocol.

8.6 The Committee notes that the author has not provided any clarification of her claims under article 14 (3) (g) of the Covenant. It thus finds that part of claim unsubstantiated and inadmissible under article 3 of the Optional Protocol.

8.7 The Committee considers that the author has sufficiently substantiated her remaining claims under articles 19 (2) and 21 of the Covenant in communication No. 2542/2015 and under article 21 in communication No. 2543/2015 for the purposes of admissibility. It therefore declares them admissible and proceeds with examination of the merits.

#### *Consideration of the merits*

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

#### *Communication No. 2542/2015*

9.2 The Committee notes the author’s claim that her right to impart information under article 19 (2) of the Covenant was violated because she was sanctioned for distributing invitations to a public meeting on 3 September 2013. The Committee must therefore decide whether the limitations imposed on the author are allowed under one of the restrictions laid out in article 19 (3) of the Covenant.

9.3 The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. Those freedoms are essential for any society and constitute the foundation stone for every free and democratic society (para. 2). All restrictions imposed on freedom of expression must conform to the strict tests of necessity and proportionality, “must be applied only for those purposes for which they were prescribed” and “must be directly related to the specific need on which they are predicated” (para. 22).

9.4 The Committee notes the State party’s argument that the national legislation is in line with the provisions of article 19 (3) of the Covenant and is aimed at regulating and not restricting freedom of expression. The Committee observes, however, that no explanation has been provided by the State party as to how the author’s actions were endangering the rights or reputation of others, national security or public order (*ordre public*), or public

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

<sup>6</sup> See, *mutatis mutandis*, *Osiyuk v. Belarus*, para. 7.4.

health or morals in the light of article 19 (3) of the Covenant. In the absence of such an explanation, the Committee finds that sanctioning the author for distributing invitations to a peaceful public event, albeit unauthorized, was not necessary and proportionate pursuant to the conditions set out in article 19 (3) of the Covenant.<sup>7</sup> It therefore concludes that the author's rights under article 19 (2) of the Covenant have been violated.

9.5 As to the author's allegations that her rights under article 21 of the Covenant were violated, the Committee recalls that the right of peaceful assembly is a fundamental human right that is essential for the public expression of an individual's views and opinions and indispensable in a democratic society.<sup>8</sup> That right entails the possibility of organizing and participating in a peaceful assembly in a publicly accessible location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to that right is permissible unless it is: (a) imposed in conformity with the law and (b) necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right of peaceful assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it.<sup>9</sup> The State party is thus under an obligation to justify any limitation of the right protected by article 21 of the Covenant and to demonstrate that it does not pose a disproportionate obstacle to the exercise of that right.<sup>10</sup>

9.6 The Committee observes that a requirement to notify or seek an authorization from the authorities, where an authorization regime amounts in fact to a system of notification and the authorization for carrying out a public event is granted as a matter of course, does not, in itself, violate article 21 of the Covenant, if its application is in line with the provisions of the Covenant. In any event, where a notification or authorization regime procedure is used it should not be overly burdensome.<sup>11</sup> Even in the case of an unauthorized assembly, any interference with the right of peaceful assembly must be justified under the second sentence of article 21.

9.7 The Committee observes that the State party relied only on the provisions of the law on public events, which requires a request to be lodged 10 days in advance and permission from the local authorities for a peaceful assembly, which already in itself restricts the right of peaceful assembly. The State party has not attempted to demonstrate that the apprehension, trial and imposition of a sanction on the author for the organization of a peaceful assembly was necessary in a democratic society and proportionate to the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others, as required under article 21 of the Covenant. The Committee therefore concludes that the State party has violated article 21 of the Covenant.

#### *Communication No. 2543/2015*

9.8 The Committee notes that on 15 February 2014, the author took part in an allegedly spontaneous assembly to protest against the sudden 30 per cent devaluation of the national currency. The Committee notes the author's claim that the 10-day authorization requirement in the State party's legislation deprives people of their right to carry out peaceful assemblies (para. 5.2 above) and that the State party violated her right under article 21 by fining her for participation in an unauthorized spontaneous assembly. The Committee also notes the State party's argument that no request for authorization of the event in question was sought from the local authorities, as required under national law and

<sup>7</sup> See, for example, *Pivonos v. Belarus*, (CCPR/C/106/D/1830/2008), para. 9.3; *Androsenko v. Belarus*, (CCPR/C/116/D/2092/2011), para.7.3; and *Toregozhina v. Kazakhstan* (CCPR/C/124/D/2257/2013 and CCPR/C/124/D/2334/2014), para. 7.5; and general comment No. 34, para. 34.

<sup>8</sup> See, for example, *Korol v. Belarus* (CCPR/C/117/D/2089/2011), para. 7.5.

<sup>9</sup> See *Korol v. Belarus*, para. 7.5 and *Toregozhina v. Kazakhstan*, para. 7.3.

<sup>10</sup> See *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.

<sup>11</sup> See, for example, *Poliakov v. Belarus*, (CCPR/C/111/D/2030/2011), para. 8.3.

that the protest presented a threat to public order and safety and to the operation of public infrastructure. The Committee notes, however, that the State party has not provided any further information to support the latter statement.

9.9 The Committee observes that a requirement to seek an authorization from the authorities for holding a public event does not, in itself, violate article 21 of the Covenant. In the present case, the Committee observes that the authorization requirement in the national legislation excludes any possibility of spontaneous assemblies, which cannot by their very nature be subject to a lengthy system of submitting a prior request for authorization.<sup>12</sup> The Committee notes, therefore, that there is no legal basis for regulating spontaneous assemblies in the State party.

9.10 The Committee notes that even in case of an unauthorized assembly, any interference with the right of peaceful assembly must be justified by the State party in the light of the second sentence of article 21. It observes that the State party has not attempted to demonstrate that the imposition of a sanction on the author for participation in a peaceful spontaneous assembly was necessary in a democratic society and proportionate to the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, as required under article 21 of the Covenant. The Committee therefore concludes that the State party has violated article 21 of the Covenant in relation to communication No. 2543/2015.

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 the author's rights under articles 19 (2) and 21 of the Covenant in regard to communication No. 2542/2015 and article 21 of the Covenant in communication No. 2543/2015.

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. That requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide the author with adequate compensation, including reimbursement for any legal costs incurred by her. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In that connection, the Committee reiterates that, pursuant to its obligations under article 2 (2) of the Covenant, the State party should review its legislation with a view to ensuring that the rights under articles 19 and 21 of the Covenant, including the right to organize and conduct peaceful, including spontaneous, assemblies, meetings, processions, pickets and demonstrations, may be fully enjoyed in the State party.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

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<sup>12</sup> See, *mutatis mutandis*, *Popova v. Russian Federation* (CCPR/C/122/D/2217/2012), para. 7.5.