



## 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. 2092/2011\*, \*\*

<i>Communication submitted by:</i>	Sergei Androsenko (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	20 June 2010 (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 30 March 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	30 March 2016
<i>Subject matter:</i>	Imposition of a fine for holding a peaceful assembly without prior authorization
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to freedom of expression; right of peaceful assembly
<i>Articles of the Covenant:</i>	19 and 21
<i>Articles of the Optional Protocol:</i>	5 (2) (b)

\* Adopted by the Committee at its 116th session (7-31 March 2016).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.



1. The author of the communication is Sergei Androsenko, a national of Belarus born in 1988. He claims that the State party violated his rights under articles 19 (2) and 21 of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented by counsel.

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

2.1 On 16 December 2009, the author, together with other activists, handed a petition to representatives of the embassy of the Islamic Republic of Iran in Minsk calling for an end to punishment of homosexuals in that country.<sup>1</sup> After the petition was delivered, the author, together with others, held a peaceful assembly (demonstration) during which he held up a poster that read “Stop killings of gays in Iran”. In about 15 minutes, the author was apprehended by the police and taken to the Department of Internal Affairs of the Soviet District, where he was charged with an administrative offence under article 23.34, paragraph 2, of the Code of Administrative Offences of Belarus (conduct of a public gathering), accused of being in violation of the established procedure on the organization of gatherings under the Law on mass events in the Republic of Belarus of 1997. Under that law, organizers of public events are required to obtain permission to conduct a gathering from the local executive authorities 15 days before the holding of the event. The author had failed to request such permission.

2.2 On 23 December 2009, the Court of the Soviet District in Minsk found the author guilty of an administrative offence under article 23.34 of the Code of Administrative Offences and fined him 875,000 Belarusian roubles.<sup>2</sup> The court found that the author and the other participants had taken part in an unauthorized mass event without obtaining prior authorization as required by article 5 of the Law on mass events.

2.3 On 30 December 2009, the author filed a cassation appeal against the decision of the Court of the Soviet District before the City Court of Minsk. On 19 January 2010, the City Court of Minsk confirmed the district court’s decision and rejected the author’s appeal.

2.4 On 17 February 2010, the author applied for a supervisory review of the lower courts’ decisions to the Supreme Court of Belarus. By letter of 7 April 2010, the Deputy Chair of the Supreme Court informed the author that his application was dismissed. The author submits that he has thus exhausted all available domestic remedies.

#### **The complaint**

3.1 The author claims that the facts as presented amount to a violation of his rights under article 21 of the Covenant, as the authorities did not provide any justification for the restriction of his rights and for his apprehension. He further claims that the imposed restrictions are not necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others. While he admits that he did not request prior authorization to participate in the demonstration, he claims that the legal regime in Belarus, under which prior permission is required before holding such a demonstration, imposes unacceptable restrictions on the freedoms guaranteed under article 21. According to article 5 of the Law on mass events, organizers of demonstrations are required to establish a contract with the Department of the Interior of the District Administration to ensure that public order is maintained during the demonstration; a contract with the Health Department to ensure that medical care is provided; and a contract with the Utilities Department to ensure that the

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<sup>1</sup> The author is the head of the lesbian, gay, bisexual and transgender human rights project “Gay Belarus”.

<sup>2</sup> The equivalent of €212.38.

area where the demonstration is to take place is cleaned following the event. Demonstrations are also forbidden within 50 metres of diplomatic premises, which the author considers unacceptable in his case, since holding the demonstration at any other location would have defeated its purpose.

3.2 The author also claims that his arrest and conviction amount to a violation of his right to freedom of expression under article 19 of the Covenant. He refers to the Committee's Views<sup>3</sup> in which it found a violation of article 19 despite the fact that the national courts in question had acted in accordance with domestic legislation, and its Views<sup>4</sup> in which it found it incompatible with the Covenant that the State party had given priority to the application of its national law over its obligations under the Covenant. The author further submits that Belarus has not submitted a notification under article 4 (3) of the Covenant to avail itself of the right to derogate from certain rights on the grounds of a public emergency.

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

4.1 In a communication dated 14 February 2012, the State party challenged the registration of the communication and its admissibility. It argues that the author failed to exhaust all available domestic remedies as he did not apply for supervisory review of the domestic courts' decisions. In particular, the State party states that the author did not apply to the Chair of the Supreme Court after having received the answer from the Deputy Chair under article 12.11 of the Procedural Executive Code on Administrative Offences. The State party submits that there are no legal grounds for the consideration by the State party of the communication either on admissibility or on the merits.

4.2 By a note verbale dated 4 January 2013, the State party reiterated its position regarding the admissibility of the communication.

#### **Authors' comments on the State party's observations**

5. In a communication dated 6 September 2012, the author stated that the decision on cassation of the Minsk City Court had become executory. He argues that the supervisory review procedure cannot be considered an effective domestic remedy because an appeal submitted under the procedure would not automatically result in the repeal of the court decision. Public officials would consider such an appeal unilaterally and in the absence of the individual who was the subject of the administrative procedures in question. The author refers to the Committee's jurisprudence<sup>5</sup>, in which it stated that the supervisory review was a discretionary review process common in former Soviet Republics, which the Committee had previously considered not to constitute an effective remedy for the purposes of exhaustion of domestic remedies. He recalls in this regard that his appeals to the Chair of the Minsk City Court and the Chair of the Supreme Court under the supervisory review procedure were rejected. He notes in particular that the reply from the Supreme Court was signed by the Deputy Chair, despite the fact that the appeal had been addressed specifically to the Chair. The author considers that in these circumstances, repeated appeals to the Chair of the Court would stand little chance of success. As to the State party's reference to article 12.11 of the Procedural Executive Code on Administrative Offences, the author states that the provision does not establish a requirement of a consecutive appeal first to the Deputy

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<sup>3</sup> See communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005, para. 7.2.

<sup>4</sup> See communication No. 628/1995, *Tae Hoon Park v. Republic of Korea*, Views adopted on 3 November 1998, para. 10.4.

<sup>5</sup> See communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009, note 7.

Chair and then to the Chair of the Court. He concludes that all available and effective domestic remedies have been exhausted in his case.

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

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 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 that the State party has challenged the admissibility of the communication, claiming that under the supervisory review proceedings before the Supreme Court, the author should have requested a review by the Chair of the Court after he had received an answer from the Deputy Chair. From the documents on file, however, it transpires that the author did indeed address his application for supervisory review to the Chair of the Supreme Court, although the letter dismissing his application was signed by the Deputy Chair.<sup>6</sup> In the circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee considers that the author has sufficiently substantiated his claims under articles 19 (2) and 21 of the Covenant for purposes of admissibility. It therefore declares them admissible and proceeds with its examination of the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that his apprehension and conviction for his participation in a peaceful demonstration held without prior authorization constitute an unjustified restriction on his rights to freedom of expression and to freedom of assembly as protected by articles 19 (2) and 21 of the Covenant. The Committee must therefore consider whether the restriction imposed on the author's rights in the present case are justified under any of the criteria set out in article 19 (3) and in the second sentence of article 21 of the Covenant.

7.3 The Committee recalls that article 19 (3) of the Covenant allows certain restrictions only as provided by law and necessary for the respect of the rights and reputation of others and for the protection of national security or public order (*ordre public*) or public health or morals. The Committee refers to its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it stated that those freedoms were indispensable conditions for the full development of the person and were essential for any society. They constituted the foundation stone for every free and democratic society. Any restriction on the exercise of those freedoms must conform to the strict tests of necessity and

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<sup>6</sup> See communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para 7.4; No. 1851/2008, *Serkerko v. Belarus*, Views adopted on 28 October 2013, para 8.3; Nos. 1919-1920/2009, *Protosko and Tolchin v. Belarus*, Views adopted on 1 November 2013, para. 6.5; No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2; and No. 2041/2011, *Dorofeev v. Russian Federation*, Views adopted on 11 July 2014, para 8.6.

proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they were predicated. The Committee recalls<sup>7</sup> that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 were necessary and proportionate.

7.4 The Committee also recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for the public expression of one's views and opinions and is indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly, including the right to a stationary assembly (such as a picket) in a public location. The organizers of an assembly generally have the right to choose a location within sight and hearing of their target audience; no restriction to this right is permissible unless it is imposed in conformity with the law and is necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.

7.5 The Committee notes the author's allegations that he was apprehended and brought to a police station for participating in a peaceful but unauthorized demonstration and for holding a poster that read "Stop killings of gays in Iran" in front of the embassy of the Islamic Republic of Iran in Minsk. He later received an administrative fine for the violation of article 23.34, paragraph 1, of the Belarus Code of Administrative Offences.

7.6 The Committee notes the author's claim that he was unable to request prior authorization to participate in the demonstration owing to the stringent regime of the Law on mass events, which imposes unreasonable restrictions on the right guaranteed by article 21 of the Covenant. The Committee recalls that, while imposing restrictions on the right of freedom of peaceful assembly, the State party should be guided by the aim of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it.<sup>8</sup> In that regard, the Committee notes that, while the restrictions imposed in the author's case were in accordance with the law, the State party has not attempted to explain why such restrictions were necessary and whether they were proportionate for one of the legitimate purposes set out in the second sentence of article 21 of the Covenant. Nor did the State party explain how, in practice in the present case, the author's participation in a peaceful demonstration in which only a few persons participated could have violated the rights and freedoms of others or posed a threat to the protection of public safety or public order or of public health or morals. The Committee observes that, while ensuring the security and safety of the embassy of a foreign State may be regarded as a legitimate purpose for restricting the right to peaceful assembly, the State party must justify that the apprehension of the author and the imposition on him of an administrative fine were necessary and proportionate to that purpose. Therefore, in the absence of any pertinent explanation from the State party, the Committee considers that due weight must be given to the author's allegations.

7.7 The Committee notes that the author was apprehended and given an administrative fine in accordance with article 23.34, paragraph 1, of the Code of Administrative Offences of Belarus because of his participation in an unauthorized demonstration. The Committee notes that the State party has failed to demonstrate that the apprehension and fine imposed

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<sup>7</sup> See, for example, communications No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 9.3 and No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para. 8.5.

<sup>8</sup> See communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.4.

on the author, although based in law, were necessary and proportionate to achieve one of the legitimate purposes under the second sentence of article 21 of the Covenant. The Committee therefore concludes that the facts as submitted reveal a violation by the State party of the author's rights under article 21 of the Covenant.

7.8 Likewise, in the absence of any pertinent information from the State party to justify the restrictions imposed contrary to the provisions of article 19 (3) of the Covenant, the Committee concludes that the author's rights under article 19 (2) of the Covenant have been violated.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State party has violated the author's rights under articles 19 (2) and 21 of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide the author with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the Committee reiterates that the State party should review its legislation, in particular the Law on mass events of 30 December 1997, as it was applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant can be fully enjoyed in the State party.<sup>9</sup>

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 the State party in Belarusian and Russian.

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<sup>9</sup> See, for example, *Sekerko v. Belarus*, para. 11 and *Turchenyak et al. v. Belarus*, para. 9; and communications No. 1790/2008, *Govsha, Syritsa and Mezyak v. Belarus*, Views adopted on 27 July 2012, para. 11 and No. 1934/2010, *Bazarov v. Belarus*, Views adopted on 24 July 2014, para. 9.