



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1873/2009

##### Views adopted by the Committee at its 109th session (14 October – 1 November 2013)

<i>Submitted by:</i>	Nikolai Alekseev (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	25 March 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 28 April 2009 (not issued in a document form)
<i>Date of adoption of Views:</i>	25 October 2013
<i>Subject matter:</i>	Right to peaceful assembly
<i>Procedural issues:</i>	Same matter already being examined under another procedure of international investigation or settlement; exhaustion of domestic remedies; level of substantiation of claims
<i>Substantive issues:</i>	Unjustified restrictions to the right of peaceful assembly
<i>Article of the Covenant:</i>	21
<i>Articles of the Optional Protocol:</i>	2; 5, paragraphs 2 (a) and (b)

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (109th session)**

concerning

#### **Communication No. 1873/2009\***

*Submitted by:* Nikolai Alekseev (not represented by counsel)

*Alleged victim:* The author

*State party:* Russian Federation

*Date of communication:* 25 March 2009 (initial submission)

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting on 25 October 2013,*

*Having concluded* its consideration of communication No. 1873/2009, submitted to the Human Rights Committee by Nikolai Alekseev under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Nikolai Alekseev, a Russian national born in 1977. He claims to be a victim of violation by the Russian Federation of his rights under article 21 of the International Covenant on Civil and Political Rights.<sup>1</sup> The author is not represented by counsel.

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

2.1 The author is a homosexual and a human rights activist. From 2006 to 2008, the author, together with other activists, tried to organize a number of peaceful assemblies (gay pride marches) in Moscow, which were all banned by the municipal authorities.

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\* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

<sup>1</sup> The Optional Protocol entered into force for the State party on 1 January 1992.

2.2 On 11 July 2008, the author, together with two other activists, submitted a request to the Prefect of the Central Administrative District of Moscow to hold a stationary meeting – a picket –, in front of the Iranian Embassy in Moscow. The purpose of the gathering was to express concern over the execution of homosexuals and minors in the Islamic Republic of Iran and to call for a ban on such executions. The author informed the authorities of the purpose, date, time and place of the event, which was scheduled to take place from 1 p.m. to 2 p.m. on 19 July 2008 in front of the Iranian Embassy, and which would involve no more than 30 participants.

2.3 On the same date, the Deputy Prefect of the Central Administrative District of Moscow refused to authorize the event, considering that the aim of the picket would trigger “a negative reaction in society” and could lead to “group violations of public order which can be dangerous to its participants”.

2.4 On 16 July 2008, the author filed a complaint against this refusal with the Tagansky District Court of Moscow. He argued that Russian law does not permit a blanket ban on conducting a peaceful assembly, as long as the purpose of the assembly is in conformity with constitutional values. He added that if the Prefecture had any serious grounds to believe that the proposed picket would trigger mass riots, they should have arranged sufficient police protection for participants of the assembly in order to secure the exercise of their constitutional right to peaceful assembly.

2.5 On 18 September 2008, the Tagansky District Court rejected the complaint and endorsed the municipal authority’s argument that it was impossible to ensure security of the participants of the event and avoid riots, as the proposed event would provoke strong public reaction. In the court’s opinion, the decision of 11 July 2008 was in conformity with both national law and the provisions of the European Convention on Human Right and Fundamental Freedoms. On 5 October 2008, the author appealed the judgement before the Moscow City Court on cassation proceedings, but his appeal was rejected on 18 December 2008.

### **The complaint**

3. The author claims that the State party violated his right to peaceful assembly as protected by article 21 of the Covenant, as it imposed a blanket prohibition on the meeting that he had intended to organize. The authorities’ refusal was not imposed “in conformity with the law” nor was it “necessary in a democratic society”. In particular, national law clearly requires that the authorities take the necessary measures to ensure the security of the participants in an assembly and to secure its peaceful conduct. Moreover, the restriction imposed was not “necessary in a democratic society” and did not pursue any of the legitimate aims mentioned in article 21 of the Covenant. The authorities’ refusal to propose an alternative location for the mass event in question and their assertion that they could not provide sufficient police force to protect the participants, demonstrate that the authorities’ real aim was to prevent the gay and lesbian minority in Russia from becoming visible to the public and from attracting public attention to their concerns. Finally, the fact that a minority group’s ideas might “offend, shock or disturb” the majority and might provoke violent opposition cannot justify a blanket ban on the expression of views of such groups by means of peaceful assembly. On the contrary, the State party must protect peaceful assemblies of minority groups against violent acts.

### **State party’s observations on admissibility and merits**

4.1 On 29 June 2009, the State party submitted its observations on admissibility and merits. It recalls the facts of the case, and the proceedings engaged by the author. It further notes that the author’s claims under article 21 of the Covenant are unfounded as the author was refused permission to hold the picket in order to ensure public order. In this

connection, the State party notes that article 21 of the Covenant recognizes the right to peaceful assembly, but also provides for restriction to that right in conformity with the law in the interests of national security or public safety, public order, the protection of public health or morals or the protection of rights and freedoms of others. Articles 31 and 55 of the Constitution of the Russian Federation guarantee the right to peaceful assembly with similar restrictions to those set out in article 21 of the Covenant, and which are developed in the Federal Law on Rallies, Meetings, Demonstrations, Marches and Picketing (Federal Law on Mass Events). According to article 8, paragraph 1, of the Federal Law on Mass Events, public mass events may be held at any place suitable for the purposes of the event provided that such event does not endanger the security of persons participating in the event in question. The State party further notes that on 18 September 2008, the Tagansky District Court of Moscow concluded that in light of the negative public reaction towards such pickets, the authorities would not have been able to fully ensure the security of persons participating in such a mass event. The State party maintains that the authorities' refusal of 11 July 2008 was in line with the international norms and domestic legislation.

4.2 The State party adds that the author has not exhausted all domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol to the Covenant, as according to articles 367, 376, 377 and chapter 41 of the Civil Procedure Code, the author could have sought a supervisory review of the decisions of the national courts from the Presidium of the Moscow City Court and thereafter, the Supreme Court.

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

5.1 On 9 November 2009, the author notes that the State party has erroneously referred to article 8 of the Federal Law on Mass Events. According to him, this provision guarantees the right to hold a public event at any place suitable for its purposes. However, the restrictions on holding public events are linked to the security considerations at a particular place due to its characteristics, such as risk of collapse of a building, for example. Nothing in the wording of this article suggests that its aim is to provide for general restrictions on the right of peaceful assembly due to security considerations, as invoked by the State party. Furthermore, the article referred to should, in any event, be interpreted in the context of "ensuring realization of the constitutionally mandated right of the citizens of the Russian Federation to peaceful assembly [...], to hold rallies, meetings, demonstrations, marches and picketing" as stated in the preamble of the Federal Law on Mass Events.

5.2 The author submits that if the authorities invoke security considerations as a reason for refusing the holding of a mass event at a place or route proposed by the organizer, they are obligated, under article 12 of the Federal Law on Mass Events, to suggest an alternative place for the event. A different interpretation — such as placing the burden of identifying an alternative location on the organizers — would lead to the conclusion that the law in question lacks sufficient clarity and, therefore the restrictions on the right of freedom of assembly would not be regarded as being applied "in conformity with the law" for purposes of article 21 of the Covenant. According to the author, it is up to the authorities to suggest an alternative place for a mass event if they have concerns regarding the security of the participants.

5.3 As to the State party's comment regarding the exhaustion of domestic remedies, the author points out that the supervisory review proceedings do not constitute an effective remedy, as they do not ensure re-examination of the merits of the case under appeal by a panel of judges (the Presidium of the Moscow City Court or the Supreme Court). According to article 381 of the Civil Procedure Code, such an appeal is considered by a judge of the supervisory review court, who can reject it even without examining the case file materials. It is only if the judge finds the presented arguments convincing that he or she may request the case file and, at his or her discretion, remit the case to the panel of judges

of the supervisory review court for consideration. In this regard, the author refers to a similar case in 2007, where the complainant had appealed the refusal to hold a rally for the purpose of calling for tolerance towards sexual minorities under a supervisory review, but a judge of the Supreme Court had concluded that the refusal was lawful as it was not possible to ensure the participants' safety, and decided not to grant a supervisory review of the case. As his case concerned similar circumstances, the author submits that appealing through the supervisory review process would have been futile and ineffective.

5.4 The author also requests the Committee to take into account the jurisprudence of the European Court of Human Rights regarding the ineffectiveness of supervisory review proceedings, due to the fact that the grounds for quashing the final judgements of lower courts are not clear in the Civil Procedure Code, and the procedure is not directly accessible to complainants. In addition, he notes the Committee's concerns, after consideration of the sixth periodic report of the Russian Federation under the Covenant, as to systematic discrimination against individuals on the basis of their sexual orientation in the State party, including prejudices by public officials (CCPR/C/RUS/CO/6 and Corr.1, para. 27).

5.5 On 2 December 2009, the author submitted additional information. In particular, the author draws attention to the judgement of the European Court of Human Rights in the case *Martynets v. Russia*, in which the European Court assessed the effectiveness of the supervisory review proceedings in force in the State party since 7 January 2008. It concluded that the supervisory review proceedings in the State party could not be considered a domestic remedy that had to be exhausted under article 35 of the European Convention on Human Rights before lodging an application before the Court, since the supervisory review proceedings in respect of legally binding judgements could be conducted through multiple instances, with the ensuing risk that the case could go back and forth from one instance to another for an indefinite period.<sup>2</sup>

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

6.1 On 29 September 2010, the State party reiterates the facts of the case and the actions which the author undertook at the domestic level. It further reiterates that the author's claim under article 21 of the Covenant is unfounded and that similar restrictions on the enjoyment of the right to peaceful assembly, as set out in that article, are also provided for in article 55 of the Constitution and in article 8 of the Federal Law on Mass Events. It recalls that article 8 of the Federal Law on Mass Events stipulates that a public event may be held at any place suitable for the purpose of the event provided that the holding of the event does not endanger the security of the participants. In this connection, the State party maintains that the decision of the Deputy Prefect of the Central Administrative District of Moscow was based on the consideration of the above-mentioned security aspect.

6.2 It also reiterates that the author has failed to exhaust available domestic remedies within the supervisory review proceedings, therefore the present communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol to the Covenant.

6.3 The State party adds that the author has abused the right to submit a communication, as the same matter is being examined by another procedure of international investigation or settlement. In particular, it draws attention to the fact that on 29 January 2007, 14 February 2008 and 10 March 2009, the author submitted applications to the European Court of Human Rights regarding the authorities' refusal to allow him to hold a mass event (gay

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<sup>2</sup> European Court of Human Rights, *Martynets v. Russia*, application No. 29612/09, decision of 5 November 2009 as to admissibility.

pride march) and picket concerning the rights of sexual minorities.<sup>3</sup> In this connection, it submits that the complaints before the European Court and the present communication are similar in nature as they have been submitted by the same person concerning the rights of the same group of persons (belonging to sexual minorities) and the actions of the same municipal authority.

#### **Author's further comments**

7.1 On 1 November 2010, the author informed the Committee that on 21 October 2010 the European Court of Human Rights had adopted a judgement in his case,<sup>4</sup> concerning the authorities' refusal to allow him hold events similar to the ones mentioned in the present communication in 2006, 2007 and 2008. In that particular case, the European Court found a violation of the author's rights under article 11 of the European Convention on Human Rights (right to peaceful assembly).

7.2 On 30 November 2010, the author reiterated that the supervisory review proceedings could not be considered as an effective remedy for the purposes of admissibility. As to the State party's argument that the present communication should be viewed as an abuse of the right to complain because a similar matter was being examined by another international procedure, the author submits that the present complaint is based on and concerns different facts. The applications before the European Court of Human Rights concerned prohibitions to hold pride marches or pickets proposed by the author as alternatives to a pride march, while the present complaint concerns the prohibition to hold a picket protesting the execution of homosexuals and minors in the Islamic Republic of Iran. Therefore, the author considers that the present communication should be declared admissible under article 5 of the Optional Protocol to the Covenant.

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

##### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee shall ascertain whether the same matter is being examined under another procedure of international investigation or settlement. In this regard, the Committee notes the State party's argument that on 29 January 2007, 14 February 2008 and 10 March 2009, the author submitted applications to the European Court of Human Rights regarding the State authorities' refusal to allow the author to hold mass events and a picket concerning the rights of sexual minorities and that they were registered by the European Court. The State party submits that the complaints before the European Court and the present communication are of a similar nature as they have been submitted by the same person, concern the rights of the same group of persons (belonging to sexual minorities) and concern the actions of the same authorities. The Committee further notes the author's explanation that the applications before the European Court of Human Rights concerned different factual circumstances, namely the prohibition to hold pride marches or pickets proposed by the author as an alternative to a pride march, in the years 2006 to 2008, while

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<sup>3</sup> The applications are registered with the European Court of Human Rights under Nos. 4916/07; 25924/08 and 14500/09.

<sup>4</sup> See European Court of Human Rights, *Alekseev v. Russia*, applications Nos. 4916/07; 25924/08 and 14500/09.

the present complaint concerns the prohibition to hold a picket protesting the execution of homosexuals and minors in the Islamic Republic of Iran.

8.3 The Committee recalls that the concept of “the same matter” within the meaning of article 5, paragraph (a), of the Optional Protocol is understood as including the same authors, the same facts and the same substantive rights.<sup>5</sup> The Committee notes that it is clear from the available information on the case file that the author’s applications to the European Court of Human Rights concern the same person and relate to the same substantive rights as those invoked in the present communication. However, the Committee observes that the respective applications before the European Court do not relate to the same facts, that is, the particular event referred to in the present communication. Consequently, the Committee considers that it is not precluded by article 5, paragraph 2 (a), of the Optional Protocol from examining the present communication for purposes of admissibility.

8.4 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party’s argument that the author failed to exhaust available domestic remedies within the supervisory review proceedings, therefore the communication is inadmissible. In this respect, the Committee notes that the author appealed to the Moscow City Court, which upheld the lower court’s decision. The Committee refers to its case law, according to which supervisory review proceedings against court decisions which have entered into force constitute an extraordinary remedy, dependent on the discretionary power of a judge or prosecutor,<sup>6</sup> and which do not need to be exhausted for purposes of admissibility. In the absence of any other pertinent information on file, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.<sup>7</sup>

8.5 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claim under article 21 of the Covenant. It declares the communication admissible and proceeds to its examination on the merits.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2. The first issue before the Committee is whether the State party’s authorities’ restriction of the author’s right to peaceful assembly was permissible under any of the criteria contained in article 21 of the Covenant.

9.3 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is essential for the public expression of a person’s views and opinions, and indispensable in a democratic society.<sup>8</sup> It also recalls that States parties must put in place effective measures to protect against attacks aimed at silencing those exercising

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<sup>5</sup> See for example, communication No. 1002/2001, *Wallmann et al. v. Austria*, Views adopted on 1 April 2004, para. 8.4.

<sup>6</sup> See, inter alia, communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, and No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009.

<sup>7</sup> See for example, communication No. 1866/2009, *Chebotareva v. the Russian Federation*, Views adopted on 26 March 2012, para. 8.3.

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

their right to freedom of expression by means of an assembly.<sup>9</sup> A restriction of the right of peaceful assembly is permissible only if it is (a) in conformity with the law, and (b) necessary in a democratic society in 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.

9.4 In the present case, the Committee observes that both the State party and the author agree that the denial of permission to hold a picket from 1 p.m. to 2 p.m. on 19 July 2008 in front of the Iranian Embassy in Moscow was an interference with the author's right of assembly, but the parties disagree as to whether it was a permissible restriction.

9.5 The Committee also notes that the State party defends the denial of permission to hold the picket concerned as necessary in the interest of public safety. Although the author contends that the safety rationale was a pretext for denying the permit, the Committee finds it unnecessary to evaluate this factual allegation, because the author's claim under article 21 can be decided on the assumption that the challenged restriction was motivated by concern for public safety.

9.6 The Committee notes that permission for the author's proposed picket was denied on the sole ground that the subject it addressed, namely, advocacy of respect for the human rights of persons belonging to sexual minorities, would provoke a negative reaction that could lead to violations of public order. The denial had nothing to do with the chosen location, date, time, duration or manner of the proposed public assembly. Thus the decision of the Deputy Prefect of the Central Administrative District of Moscow of 11 July 2008 amounted to a rejection of the author's right to organize a public assembly addressing the chosen subject, which is one of the most serious interferences with the freedom of peaceful assembly. The Committee notes that freedom of assembly protects demonstrations promoting ideas that may be regarded as annoying or offensive by others and that, in such cases, States parties have a duty to protect the participants in such a demonstration in the exercise of their rights against violence by others. It also notes that an unspecified and general risk of a violent counterdemonstration or the mere possibility that the authorities would be unable to prevent or neutralize such violence is not sufficient to ban a demonstration. The State party has not provided the Committee with any information in the present case to support the claim that a "negative reaction" to the author's proposed picket by members of the public would involve violence or that the police would be unable to prevent such violence if they properly performed their duty. In such circumstances, the obligation of the State party was to protect the author in the exercise of his rights under the Covenant and not to contribute to suppressing those rights. The Committee therefore concludes that the restriction on the author's rights was not necessary in a democratic society in the interest of public safety, and violated article 21 of the Covenant.

9.7 In light of this conclusion, the Committee decides not to examine the author's additional claim that the denial of permission was not in conformity with the law on the grounds that the national law referred only to safety concerns such as the risk of collapse of a building, and that it obliged the authorities to designate an alternative location for the assembly when they rejected the original application.

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<sup>9</sup> See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 23, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V. The Committee notes that although general comment No. 34 refers to article 19 of the Covenant, it also provides guidance with regard to elements of article 21. See communication No. 1790/2008, *Govsha et al. v. Belarus*, Views adopted 27 July 2012, para. 9.4.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's right under article 21 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation and reimbursement of any legal costs paid by him. The State party is also under an obligation to take steps to prevent similar violations in the future.

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 or not 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 a violation has been established, 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 language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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