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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. 2848/2016*, **, ***

Communication submitted by:	Larissa Shchiryakova (represented by counsel, Leonid Sudalenko)
Alleged victim:	The author
State party:	Belarus
Date of communication:	7 December 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 8 November 2016 (not issued in document form)
Date of adoption of Views:	7 July 2022
Subject matter:	Freedom to impart information; imposition of a fine for unlawful production and distribution of mass media products
Procedural issues:	Exhaustion of domestic remedies; level of substantiation of a claim
Substantive issues:	Fair trial; freedom of expression
Articles of the Covenant:	14 (3) (b) and (d), and 19 read in conjunction with 2 (2) and (3) (b)
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is Larissa Shchiryakova, a Belarusian national born in 1973. She claims that the State party has violated her rights under article 19 read in conjunction with article 2 (2) and (3) (b), and article 14 (3) (b) and (d), of the Covenant. The Optional Protocol entered into force for the State party on 30 December 1992. The author is represented by counsel.

* Adopted by the Committee at its 135th session (27 June–27 July 2022).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** An individual opinion by Committee member Furuya Shuichi (partially dissenting) is annexed to the present Views.

Facts as submitted by the author

2.1 The author is a Belarusian freelance journalist,[1] a member of the officially registered Belarusian Association of Journalists and the Deputy Chair of the Association's Gomel branch. She collects information in Belarus and disseminates it on the Internet. On 13 January 2015, she took a camera and interviewed vendors at the central market in Gomel. She then posted her report on the Internet, and it was subsequently broadcast by the Polish satellite channel Belsat.[2]

2.2 On 4 March 2015, following the Polish channel's broadcasting of the report, police officers from Gomel's Central District initiated administrative charges against the author and filed an administrative protocol with the city's Court of Central District, claiming that she had illegally produced and distributed a mass media product in violation of article 22.9 (2) (on the illegal production and distribution of mass media products) of the Code of Administrative Offences of Belarus.

2.3 On 12 March 2015, the author was fined 3.6 million Belarusian roubles.[3] The court's reasoning was based on articles 1 and 17 of the Law on the Mass Media, which prohibits the illegal dissemination of mass media products that should have been included in the appropriate State registry.

2.4 On 17 March 2015, the author filed an appeal with the Regional Court of Gomel requesting that the decision of the Court of Central District, regarding the charges brought against her and the fine imposed, be overruled. In addition, she complained that the court had not allowed a member of the Belarusian Association of Journalists to represent her as her legal counsel in the case. On 17 April 2015, the Regional Court of Gomel rejected the appeal, upholding the decision of the lower court and stating that the right to be represented by a fellow member of the Association was not legally substantiated. On 4 September 2015, the author appealed to the Chair of the Regional Court of Gomel, who did not find sufficient grounds for cancelling the lower courts' decisions and rejected the appeal on 7 October 2015.

2.5 On 12 October 2015, the author filed a complaint requesting a supervisory review to the Chair of the Supreme Court of Belarus, who on 23 November 2015 upheld the lower courts' decisions. In addition, the author attempted to complain to the Office of the Prosecutor, which on 2 December 2015 rejected the complaint, stating that claims concerning courts' decisions were reviewed within six months of the decision of the court of first instance coming into force.

2.6 The author also notes that the current national procedural legislation does not allow Belarusian citizens to complain directly to the Constitutional Court of Belarus. Thus, the author contends that she has exhausted all available and effective domestic remedies.

Complaint

3.1 The author claims to be a victim of violations by Belarus of her rights under article 19 read in conjunction with article 2 (2) and (3) (b), and article 14 (3) (b) and (d), of the Covenant.

3.2 She claims that Belarus violated her rights under article 19 read in conjunction with article 2 (2) and (3) (b) of the Covenant, given that by creating videos and disseminating them, she was exercising her right to obtain and impart information, without undermining public order, the public interest, health, or the rights and freedoms of others.

3.3 The author further claims that she was not allowed to be represented by counsel of her own choosing and was not given sufficient time to prepare her defence, in violation of her rights under article 14 (3) (b) and (d) of the Covenant.

[1] Freelancers are not acknowledged as foreign mass media journalists and, as a result, cannot get accreditation from the Ministry of Foreign Affairs. Art. 35 (4) of the Law on the Mass Media prohibits the carrying out of journalistic activities for foreign mass media without accreditation.

[2] The author thus contributed as a journalist to Belsat, a foreign mass media company, violating the law as she was working without accreditation.

[3] Approximately equivalent to €220 on the day of the court ruling.

3.4 The author requests the Committee to recommend that the State party bring the provisions of the Law on the Mass Media into line with its international obligations under the Covenant.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 6 January 2017, the State party submitted its observations on admissibility and the merits, and noted that the author had not submitted her appeals within the required time frame for consideration. The State party notes that the author's right to appeal to the Office of the Prosecutor against the administrative fine expired on 18 October 2015.[4] The State party argues that this precludes her November 2015 supervisory review appeal to the Office of the Prosecutor of the Gomel Region and currently prevents the possibility of further appeals to the Office of the Prosecutor. Furthermore, the author cannot claim exhaustion of domestic remedies, as she failed to appeal to the Chair of the Supreme Court to review the judicial decision against her.[5]

4.2 With regard to the Law on the Mass Media, the State party submits that the restrictive measures do not contravene the Covenant. The State party emphasizes that article 19 (3) of the Covenant expressly allows for restrictions of the right to freedom of expression for respect of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals. Regarding the author's choice of legal counsel, the State party affirms that article 4.5 of the Code of Administrative Offences does not limit a person's selection of counsel, as protected under article 14 (3) (b) and (d) of the Covenant.

Author's comments on the State party's observations

5.1 On 15 May 2017, the author submitted her comments on the State party's observations. She notes that her complaint to the Chair of the Supreme Court of Belarus under the supervisory review procedure was dismissed on 23 November 2015. Regarding her appeal to the Office of the Prosecutor, the author confirms that her November 2015 appeal was submitted beyond the six-month deadline but asserts that this complaint procedure does not provide effective remedy. In particular, the author believes that she cannot obtain an effective remedy because supervisory review does not entail a review of the merits of the case and is only used at the discretion of the judge or prosecutor. In addition, the current legislation does not give a citizen the right to directly file a constitutional complaint with the Constitutional Court. Therefore, the author contends that she has exhausted all effective domestic remedies.

5.2 Regarding the State party's argument that the limitation of the author's rights was allowed under article 19 of the Covenant, the author refers to the Committee standard that any restriction must be proportionate, provided for by law, and necessary to achieve the specific goals it pursues.[6] The author contends that the State party failed to demonstrate why the restrictions on her rights as a journalist were necessary for even one legitimate purpose under article 19 (3) of the Covenant.

5.3 In response to the State party's assertion that Belarusian legislation on choice of defence counsel does not conflict with article 14 (3) of the Covenant, the author reiterates that the first instance court did not allow a member of the Belarusian Association of Journalists to represent her as her legal counsel during the court proceedings. The author points out that although the member is not licensed as an attorney, he has worked as a legal adviser to the Belarusian Association of Journalists for the past 11 years. Moreover, he would represent the author pro bono, whereas the author would otherwise have had to hire a lawyer, which she could not afford.

[4] The State party refers to the six-month deadline, which the author missed.

[5] By virtue of art. 12.11 of the Code of Administrative Offences, the author can appeal against a court decision that has entered into legal force in the case of an administrative offence to the Chair of a higher court, regardless of any complaint to the Office of the Prosecutor.

[6] See also *Park v. Republic of Korea* (CCPR/C/64/D/628/1995), in which the Committee disagreed with the State party prioritizing national legislation over rights enshrined in the Covenant.

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 97 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 notes the State party's argument that the author has failed to seek a supervisory review by the Chair of the Supreme Court, or by the Prosecutor General himself, of the decisions of the domestic courts, and that her complaint to the Office of the Prosecutor was submitted beyond the six-month deadline. In this context, the Committee considers that filing requests for supervisory review with the president of a court directed against court decisions which have entered into force and which depend on the discretionary power of a judge 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. The Committee further notes the author's argument that she indeed appealed, unsuccessfully, against these decisions under the supervisory review proceedings, namely to the Chair of the Supreme Court of Belarus and to the Office of the Prosecutor, and provided all respective materials in that regard. The Committee further recalls its jurisprudence, according to which a petition for supervisory review submitted to a prosecutor's office, dependent on the discretionary power of the prosecutor, requesting a review of court decisions that have taken effect, constitutes an extraordinary remedy, and thus does not constitute a remedy that must be exhausted for the purposes of article 5 (2) (b) of the Optional Protocol.[7] The Committee notes that in the present case, the author has exhausted all available domestic remedies, including those that constitute supervisory review proceedings, and therefore 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 further notes the author's claim that her rights under article 19, read in conjunction with article 2 (2), of the Covenant were violated. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.[8] The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of her rights under article 19, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider that an examination of whether the State party also violated its general obligations under article 2 (2) of the Covenant, read in conjunction with article 19, is distinct from the examination of the violation of the author's rights under article 19. The Committee therefore considers that the author's claims in this regard are incompatible with article 2 of the Covenant, and inadmissible under article 3 of the Optional Protocol.

6.5 The Committee also considers that the author has failed to substantiate her claims under article 19 read in conjunction with article 2 (3) of the Covenant and therefore declares this part of the communication inadmissible.

[7] *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3; and *Belsky v. Belarus* (CCPR/C/134/D/2755/2016), para. 6.3.

[8] *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4; and *Zhukovsky v. Belarus* (CCPR/C/127/D/2955/2017), para. 6.4.

6.6 The Committee takes note of the author's claims, framed under article 14 (3) (b) and (d) of the Covenant, that the State party violated her right to have adequate time and facilities for the preparation of her defence and to communicate with and be defended by counsel of her own choosing in the administrative proceedings against her. It further notes that the State party has responded to those allegations, stating that article 4.5 of the Code of Administrative Offences does not limit a person's selection of counsel, as protected under article 14 (3) (b) and (d) of the Covenant. In this context, the Committee notes that the author was accused of an administrative offence, whereas article 14 (3) (b) and (d) provides guarantees in cases regarding the determination of criminal charges against individuals. The Committee 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. The notion may also extend to sanctions that, regardless of their qualification under domestic law, must be regarded as penal in nature because of their purpose, character or severity. In this regard, the Committee has considered in previous case law that, for instance, sanctions consisting of administrative detention of a certain length may require the application of article 14 (3) guarantees, regardless of their qualification under domestic law, and of the fact that they were imposed in administrative procedures.[9] In the present case, however, the author did not sufficiently substantiate her claims for the purposes of article 14 (3) (b) and (d) of the Covenant, namely that the procedure she was subjected to, and particularly the fine imposed on her, due to its purpose, character or severity, should be considered as amounting to a criminal charge. In these circumstances, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.7 The Committee notes that the author's remaining claims as submitted raise issues under article 19 of the Covenant, considers that these claims are sufficiently substantiated for the purposes of admissibility, and proceeds with its consideration of the merits.

Considerations of the merits

7.1 The Committee has considered the communication in the light of all the information submitted 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 the courts failed to establish how the restriction on her right to freedom of expression fell within one of the permissible restrictions as prescribed under article 19 (3) of the Covenant. The Committee also notes the author's claim that, in the absence of such justifications, her rights under article 19 of the Covenant were violated.

7.3 The Committee recalls in that respect its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it points out, inter alia, that freedom of expression is essential for any society and a foundation stone for every free and democratic society.[10] It notes that article 19 (3) of the Covenant allows restrictions on freedom of expression, including the freedom to impart information and ideas, only to the extent that they are provided by law and only if they are necessary: (a) for respect of the rights and reputations of others; or (b) for the protection of national security or public order (*ordre public*), or of public health or morals. Finally, any restriction on freedom of expression must not be overly broad in nature – that is, it must be the least intrusive among the measures that might achieve the relevant protective function and must be proportionate to the interest to be protected.[11] The Committee recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.[12]

7.4 The Committee notes that the author was sanctioned for filming local residents, and vendors at the market, and distributing video materials via the Internet and through a foreign satellite channel, without a valid accreditation. The author was fined by the district court for

[9] According to para. 15 of the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial. See also *Sadykov v. Kazakhstan* (CCPR/C/129/D/2456/2014), paras. 6.5–6.6.

[10] See para. 2.

[11] Ibid., para. 34.

[12] *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3; and *Zhukovsky v. Belarus*, para. 7.3.

illegal production and distribution of mass media products in violation of the Law on the Mass Media. The Committee further notes that neither the State party nor the domestic court have provided any explanations as to how such restrictions were justified pursuant to the conditions of necessity and proportionality as set out in article 19 (3) of the Covenant, and whether the penalty imposed (i.e. the administrative fine), even if based on law, was necessary, proportionate and in compliance with any of the legitimate purposes listed in the mentioned provisions. In these circumstances, the Committee concludes that the rights of the author under article 19 (2) have been violated.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 19 (2) of the Covenant.

9. Pursuant to 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, including reimbursement of the fine and the 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 notes that it has dealt with similar cases in respect of the same laws and practices of the State party in a number of earlier communications, and thus the State party should revise its normative framework, in particular its Law on the Mass Media, consistent with its obligation under article 2 (2) of the Covenant, with a view to ensuring that the rights under article 19 of the Covenant may be fully enjoyed in the State party.

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 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.

Annex

Individual opinion of Committee member Furuya Shuichi (partially dissenting)

1. I agree with the finding that the facts in the present case disclose a violation of article 19 (2) of the Covenant. However, I am unable to concur with the conclusion that the author's claims under article 14 (3) (b) and (d) are inadmissible.[1]

2. According to the Committee's general comment No. 32 (2007), the notion of a criminal charge may extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity. The Committee's Views, though following this principle, point out that, in previous case law, sanctions of administrative detention of a certain length may require the application of article 14 (3) guarantees, and find that "the author did not sufficiently substantiate her claims …, namely that the procedure she was subjected to, and particularly the fine imposed on her, due to its purpose, character or severity, should be considered as amounting to a criminal charge" (see para. 6.6 above). However, this finding does not interpret the relevant case law appropriately and, in my view, overly values the element of lesser severity of the sanction imposed on the author.

3. It must be noted that the general comment enumerates in parallel the three elements of "purpose", "character" and "severity", linking these words with the conjunction "or". In fact, in the previous cases regarding the application of the Code of Administrative Offences in the State party, the Committee has mainly evaluated the purpose and the character, rather than the severity, of sanctions, with the authors in most cases having been subjected to administrative arrest or detention. In *Osiyuk v. Belarus*, in which the author was accused of violating article 184-3 of the 1984 Code of Administrative Offences (on unlawful crossing of the national frontier), the Committee found that "although administrative according to the State party's law, the sanctions imposed on the author had the aims of repressing, through penalties, offences alleged against him and of serving as a deterrent for the others, the objectives analogous to the general goal of the criminal law. It further notes that the rules of law infringed by the author are directed, not towards a given group possessing a special status – in the manner, for example, of disciplinary law – but towards everyone in his or her capacity as individuals crossing the national frontier of Belarus; they prescribe conduct of a certain kind and make the resultant requirement subject to a sanction that is punitive. Therefore, the general character of the rules and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offences in question were, in terms of article 14 of the Covenant, criminal in nature."[2] Likewise, the Committee relied on the same reasoning in *E.V. v. Belarus*, in which the author was accused of violating article 23.34 of the 2003 Code of Administrative Offences (on participation in an unsanctioned mass event).[3]

4. In the present case, the sanctions imposed on the author were based on the same 2003 Code of Administrative Offences, which had the aims of repressing, through penalties, offences alleged against her and serving as a deterrent to others. The rules of law infringed by the author are directed not towards a given group possessing a special status, but towards every person in his or her capacity as an individual creating and disseminating videos. Those facts would lead to a conclusion that the general character of the rules in the Code of Administrative Offences and the purpose of the penalty thereunder, as in those previous cases above, suffice to show that the administrative proceedings in question were criminal in nature.

5. Furthermore, as the State party admitted in its observations, according to article 4.5 of the Procedural and Executive Code of Administrative Offences, at the request of an individual in respect of whom the administrative process is being conducted, one of the close relatives or legal representatives of the individual may be admitted as a defence counsel by a

[1] Human Rights Committee, general comment No. 32 (2007), para. 15.
[2] *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), para. 7.4.
[3] *E.V. v. Belarus* (CCPR/C/112/D/1989/2010), para. 6.5.

decision of the body conducting the administrative process. This implies that, in the administrative proceedings under the Code of Administrative Offences, the author has a right to be represented by counsel of her own choosing. In this regard as well, the author's claim concerning her representation in the administrative proceedings falls within the scope of the article 14 (3) guarantees.

6. In light of the reasons mentioned in the previous paragraphs, I consider that the author's claims under article 14 (3) are admissible.

7. On the merits, it is a fact, which was not refuted by the State party, that the Court of Central District, Gomel, did not allow a member of the Belarusian Association of Journalists to represent the author as her legal counsel, and the Regional Court of Gomel rejected her appeal on this issue. Those courts and the State party did not provide any legitimate reasons why the person she appointed as her counsel was not eligible to represent her before the Court of Central District. Accordingly, I must conclude that the facts before the Committee also show a violation of article 14 (3) (b) and (d) of the Covenant.