



International Covenant on Civil and Political Rights

Distr.: General
13 January 2022

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2899/2016*, **

<i>Communication submitted by:</i>	Elena Lutskovich (represented by counsel, Leonid Sudalenko)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	1 June 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 15 December 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	19 October 2021
<i>Subject matter:</i>	Administrative fine imposed on the author for carrying a poster
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Freedom of expression
<i>Articles of the Covenant:</i>	2 (2) and (3) and 19
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is Elena Lutskovich, a national of Belarus born in 1981. She claims that the State party violated her rights under article 2 (2) and (3) and article 19 of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is represented by counsel.

Facts as presented by the author

2.1 On 30 October 2015, the author conducted a single-person picket on Socialists Street in the town Oktyabrsky in the Gomel region of Belarus. She held a banner reading "I have proof that the election results were falsified", in reference to the Presidential election that was held on 11 October 2015. She was arrested by police officers, who drew up a record of an administrative offence under article 23.34 (1) of the Administrative Code for the breach

* Adopted by the Committee at its 133rd session (11 October–5 November 2021).

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



of the order for the organization and holding of mass events. The police noted that the author did not seek prior authorization with the city executive authorities for her picket, claiming that she was expressing her own opinion, not organizing a mass event.

2.2 On 4 November 2015, the court of the Oktyabrsky district of Gomel region found the author guilty of violating article 23.34 (1) of the Administrative Code and fined her in the amount of 2,700,000 Belarusian roubles.¹ The author filed an appeal with the Gomel regional court on an unspecified date. In her appeal, she expressed her disagreement with the findings of the lower court. She claimed that in freely expressing her views she had acted within the provisions of the Belarus Constitution and that she had never participated in a “mass event”, as claimed by the lower court.

2.3 The regional court rejected her appeal on 27 November 2015. It agreed with the lower court, relying on reports drawn up by police officers. The court disregarded the author’s arguments regarding the Belarus Constitution and the provisions of the Covenant mentioned by the author in her appeal. On 23 December 2015 and on 24 February 2016, the author appealed under supervisory review proceedings to the Chair of the Gomel regional court and to the Chair of the Supreme Court, respectively. Her appeals were rejected on 4 February and 11 April 2016, with the Chairs of both courts fully upholding the findings of the lower court.

Complaint

3.1 The author claims that her rights under article 19, in conjunction with article 2 (2) and (3) of the Covenant, were violated by the unnecessary restrictions imposed by the authorities on her right to freedom of expression.

3.2 She asks the Committee to find a violation by Belarus of article 19 in conjunction with article 2 (2) and (3) of the Covenant and to urge the State party to bring its legislation on the right of peaceful assembly into line with the requirements of articles 19 and 21 of the Covenant.

State party’s observations on admissibility and the merits

4.1 By a note verbale of 10 February 2017, the State party provides its observations regarding admissibility and the merits of the communication. It submits that while the author filed appeals with the regional court and the Supreme Court of Belarus under the supervisory review procedure, she did not file a supervisory appeal to the prosecutor’s office, as required under article 12.11 (1) of the Administrative Code. The failure of the author to do so means that she failed to exhaust the available domestic remedies. Her communication can thus be regarded as an abuse of the right of submission to the Committee under article 3 of the Optional Protocol to the Covenant.

4.2 The State party adds that the author’s claims regarding the violation of her rights under articles 19 and 21, as well as article 2 (2) and (3), of the Covenant, are also without merit. The Belarus Constitution, in articles 33 and 35, guarantees these rights to its citizens. The Public Events Act, dated 30 December 1997, also provides full guarantees to protect the constitutional rights of the citizens of Belarus and cannot be considered as limiting their rights under article 19 (3) of the Covenant.

Author’s comments on the State party’s observations

5.1 On 17 March 2017, responding to the State party’s observations, the author submits that the system of supervisory reviews is not an effective remedy that needs to be exhausted. The outcome of such review is dependent on the discretionary power of judges and prosecutors, and the Committee has long recognized that such appeals are ineffective and unnecessary.² The author did not avail herself of the right to file an appeal to the prosecutor’s office since it does not lead to the full review of the facts and evidence, is dependent solely

¹ Approximately 140 euros as of November 2014 (*source*: National Bank of Belarus, <http://www.nbrb.by/statistics/rates/ratesDaily.asp?date=2015-11-04>).

² The author refers, inter alia, to *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998).

on the discretion of the reviewing prosecutor, and thus it cannot be considered as an effective remedy.

5.2 The author emphasizes that the State party does not mention in its observations that it still does not comply with the findings of the European Commission report dated 16–17 March 2012, in which a number of amendments to the Public Events Act were recommended. She adds that the State party has failed to implement numerous Views of the Committee, wherein it asked Belarus to bring its legislation into line with international human rights standards. The author submits that the law, as it is now being implemented, led to the violation of her rights.

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 article 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 takes note of the State party's statement that the author failed to exhaust all domestic remedies, in particular as she did not appeal to the prosecutor's office under supervisory review proceedings. The Committee notes the author's assertion that supervisory review proceedings are not considered by the Committee as constituting an effective remedy.³ The Committee notes that the author filed two supervisory review complaints, on 23 December 2015 and on 24 February 2016, both of which were rejected (see para. 2.3 above) by the Chairs of the regional court and the Supreme Court. In this context, the Committee recalls its previous jurisprudence, according to which the filing of a request for supervisory review with regard to court decisions that have entered into force and depend on the discretionary power of a prosecutor does not constitute a remedy that must be exhausted for the purposes of admissibility.⁴ Accordingly, the Committee considers that it is not precluded by the requirements of article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee takes note of the author's submission that the State party violated her rights under article 2 (2), read in conjunction with article 19, of the Covenant. The Committee reiterates that the provisions of article 2 cannot be invoked in 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.⁵ 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 the examination of whether the State party has also violated its general obligations under article 2 (2), read in conjunction with article 19, of the Covenant to be distinct from an examination of the violation of the author's rights under article 19 of the Covenant. It therefore considers that this part of the author's communication is incompatible with article 2 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

6.5 The Committee also noted the author's claims under article 2 (3), read in conjunction with article 19, of the Covenant. In the absence of any further pertinent information on file, however, the Committee considers that the author has failed to sufficiently substantiate these

³ For example, *Gerashchenko v. Belarus* (CCPR/C/97/D/1537/2006), para. 6.3.

⁴ See *Gelazauskas v. Lithuania*, para. 7.4, *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3, and *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3.

⁵ *Zhukovsky v. Belarus* (CCPR/C/127/D/2724/2016), para. 6.4; *Zhukovsky v. Belarus* (CCPR/C/127/D/2955/2017), para. 6.4; and *Zhukovsky v. Belarus* (CCPR/C/127/D/3067/2017), para. 6.6.

allegations for purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considers that the author's remaining claims, raising issues under article 19 of the Covenant, have been sufficiently substantiated for the purposes of admissibility and therefore proceeds to their examination on the merits.

Consideration of the merits

7.1 The Committee has considered the case in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that her right to freedom of expression has been restricted unlawfully in that she was found guilty of an administrative offence and sanctioned by a fine in the amount of 2,700,000 roubles for participating in an alleged public event, while she claims that she was simply expressing her opinion on the Presidential election held in 2015. The issue before the Committee is therefore to determine whether the sanction imposed on the author by the local authorities amounts to a violation of her rights under article 19 of the Covenant.

7.3 The Committee recalls its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it stated, *inter alia*, that freedom of expression is essential for any society and constitutes a foundation stone for every free and democratic society.⁶ It notes that article 19 (3) of the Covenant allows for certain restrictions on the freedom of expression, including the freedom to impart information and ideas, but only to the extent that those restrictions are provided for by law and if they are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. Finally, any restriction on freedom of expression must not be overbroad in nature – that is, it must be the least intrusive instrument among the measures that might achieve the relevant protective function and proportionate to the interest being protected.⁷ The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.⁸ When a State party invokes a legitimate ground for restriction of freedom of expression it must demonstrate in specific and individualized fashion the precise nature of the threat to the particular grounds listed in article 19 (3) causing it to restrict freedom of expression, as well as the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.⁹ The Committee recalls that the onus is therefore on the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.¹⁰

7.4 The Committee observes that imposing a significant fine on the author for simply claiming that the results of the presidential election held in 2015 were falsified raises serious doubts as to the necessity and proportionality of the restrictions on the author's rights under article 19 of the Covenant. The Committee observes in this regard that the State party has failed to invoke any specific grounds to support the necessity of such restrictions, as required under article 19 (3) of the Covenant.¹¹ Nor has the State party demonstrated that the measures selected were the least intrusive in nature or proportionate to the interest that it sought to protect. The Committee considers that, in the circumstances of the case, the restrictions imposed on the author, although based on domestic law, were not justified pursuant to the conditions set out in article 19 (3) of the Covenant. It therefore concludes that the author's rights under article 19 (2) of the Covenant have been violated.¹²

⁶ Human Rights Committee, general comment No. 34 (2011), para. 2.

⁷ *Ibid.*, para. 34.

⁸ *Ibid.*

⁹ *Ibid.*, paras. 35–36.

¹⁰ *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.

¹¹ See, for example, *Zalesskaya v. Belarus* (CCPR/C/101/D/1604/2007), para. 10.5.

¹² See, for example, *Svetik v. Belarus* (CCPR/C/81/D/927/2000), para. 7.3; and *Shchetko and Shchetko v. Belarus* (CCPR/C/87/D/1009/2001), para. 7.5.

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 the author's rights under article 19 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 that it 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 to reimburse the fine and any legal costs incurred. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, in particular by reviewing its national legislation on public events and the implementation thereof in order to make it compatible with its obligations under article 2 (2) of the Covenant, and to adopt measures able to give effect to the rights recognized in article 19.

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 official languages of the State party.
