



International Covenant on Civil and Political Rights

Distr.: General
29 August 2022

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2864/2016*, **

<i>Communication submitted by:</i>	Nina Erkaeva (represented by public association Dignity)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	10 October 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 22 November 2016 (not issued in document form)
<i>Date of adoption of Views:</i>	15 March 2022
<i>Subject matter:</i>	The author was refused permission to hold a one-person picket.
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression, freedom of assembly, discrimination, fair trial
<i>Articles of the Covenant:</i>	2, 14 (1), 19, 21 and 26
<i>Articles of the Optional Protocol:</i>	5 (2) (b)

1. The author of the communication is Nina Erkaeva, a Kazakh national born in 1961. She claims that the State party violated her rights under articles 2, 14 (1), 19, 21 and 26, read in conjunction with article 2, of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel.

Facts as presented by the author

2.1 The author submits that in December 2014, in the city of Karaganda, she saw a billboard that advertised the Viktoria Rehabilitation Centre, which promised assistance to victims of "negative religious influence". The author felt insulted by the words on the billboard and on 15 December 2014, she petitioned the Karaganda municipality (*akimat*) for

* Adopted by the Committee at its 134th session (28 February–25 March 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, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.



permission to hold a single-person picket near the store Yubileiny in Karaganda, at the location where she saw the billboard in question, with a view to supporting “freedom of religion and conscience as important components of building a democratic society”. On 23 December 2014, the head of the municipality, the *akim*, rejected her request, citing decision No. 3, issued by the municipality on 13 July 2007.

2.2 Decision No. 3 determines that public events such as pickets and demonstrations by ordinary citizens shall be held only near the Liteishik stadium on the outskirts of the city. However, the same decision allows government officials to hold their events in the centre of the city. The author appealed this negative decision to the Kazykbekbiy district court. The courts rejected the author’s claims at the first instance, appeal and cassation levels on, 17 February, 30 April and 2 December 2015 respectively. The courts confirmed the municipal decisions and did not find any violations of the author’s rights to equality and non-discrimination.

2.3 The author acknowledges that the municipality has a right to regulate demonstrations. But she claims that the Liteishik stadium is located on the outskirts of the city, that the stadium is abandoned and has not been used for a long time, has not been cleaned of snow and is not intended for demonstrations. The author claims that nobody would attend demonstrations there. The author claims that these restrictions are therefore arbitrary and are intended to stifle her right to hold a peaceful picket. Furthermore, these restrictions were not introduced in the interests of national security or public safety, public order, the protection of public health, morals, or the rights and freedoms of others.

Complaint

3.1 The author claims that her rights under article 14 were violated as the State party failed to ensure that the courts were impartial, independent and fair. During the court hearings, representatives of the prosecutor’s office provided their “conclusions” and since these opinions are considered “priority” by courts, this violated the author’s rights under article 14 (1) of the Covenant.

3.2 The author claims that the State party restricted her right to freedom of expression under article 19 of the Covenant, as she was planning to protest against the contents of the billboard that she had seen. Her rights were restricted in a way that was not necessary to achieve the goals as indicated by the State party. Furthermore, the fact that she was prevented from peacefully picketing at the proposed location, meant that her rights under article 21 of the Covenant were also violated.

3.3 The State party authorities also discriminate against citizens based on whether they are government employees or private citizens. That is evident from the rule that events organized by government officials can be held in the centre of Karaganda, but non-government organizations must hold their events near the Liteishik stadium, in violation of the author’s rights under article 26 of the Covenant. This treatment also violates article 2 of the Covenant.

State party’s observations on admissibility and the merits

4.1 On 30 January 2017, the State party submitted its observations on the admissibility and merits of the communication. The State party confirms that on 15 December 2014, the author requested permission from the municipality of Karaganda, to hold a one-person protest, near the Yubileiny store. The Karaganda city authorities refused to issue the permission, stating that all public events must be held near the Liteishik stadium. The author challenged this decision in the Kazykbekbiy district court, where her appeals were rejected. Furthermore, on 11 April and 20 June 2016, the Supreme Court of Kazakhstan refused to hear the author’s appeal under the cassation procedure.

4.2 The author further appealed these decisions and asked the Office of the Prosecutor General of Kazakhstan to bring a request (protest) before the Supreme Court of Kazakhstan. On 23 August 2016, the Deputy Prosecutor General rejected the author’s request. The author has a right to further appeal to the Prosecutor General, but she did not use this remedy, which is not limited in duration. In her submission, the author failed to provide sufficient arguments that this remedy is not effective and, according to the Committee’s jurisprudence, mere

doubts about the effectiveness of the remedies does not free the author from fulfilling her obligations on exhaustion of domestic remedies.

4.3 As to the merits of the communication, the law on organizing and holding peaceful assemblies allows local authorities to impose additional requirements which regulate peaceful assemblies, considering the “local conditions”. When adopting these measures, the local municipality took into consideration the necessity to protect the rights and freedoms of others, the requirements of public security and the need for proper functioning of transportation. The author asked to hold her event in a “lively part” of the city and the event, if held, could have led to threats to the public order, to the population and to the author herself. The courts took these circumstances into account and considered, inter alia, that ambulances would have had difficulties in reaching the location, if needed.

4.4 The author’s arguments about the lack of independence, impartiality and fairness of the courts due to the presence of the prosecutor during the hearings are also not substantiated. The prosecutor’s presence is foreseen by article 54 (2) of the Civil Procedure Code of Kazakhstan.

4.5 The State party further argues that the legislation on peaceful assemblies in Kazakhstan is fully compliant with international legal standards and article 32 of the Constitution of Kazakhstan protects the right of peaceful assembly for all citizens. Anyone can petition the local authorities and, upon receiving permission, hold a peaceful event. Those requirements are in line with the provisions of article 21 of the Covenant, which states that rights can be restricted in the interests of national security or public safety, public order, protection of public health or morals or the protection of the rights and freedoms of others. In its opinion, adopted during its plenary meeting on 16 and 17 March 2012, the European Commission for Democracy through Law (Venice Commission) agreed that “certain issues” on regulating public events must be left to the discretion of local authorities. The European Court of Human Rights in its decision in the case of the *Sunday Times v. the United Kingdom*, opined that the law should allow for some flexibility, admitting that it was impossible to foresee absolute certainty of laws.¹

4.6 In 2015, 146 public events were held in Kazakhstan and more than 5,000 persons participated in them. The local authorities have adopted more than 200 regulations that identify more than 500 locations for such events and more than 340 routes for peaceful demonstrations. If it is impossible, for various reasons, to hold an event on the requested date and time, the local authorities offer alternative solutions. The organizers of public events are entitled to file a complaint in the court system, which are considered within a short time frame. Unlawfully preventing someone from organizing such an event can be punishable under the Criminal Code of Kazakhstan, article 155.

4.7 The right to peaceful assembly is actively practised in Karaganda. On 17 March 2015, for example, an organization called Levie Kommunisti held a meeting near the Liteishik stadium. Other meetings were held in 2015 and 2016 as well. The author’s assertion that the decision of the municipality, dated 13 July 2007, is discriminatory in nature is therefore erroneous. According to that decision, the municipality only recommends the location of the proposed event. That decision was, however, annulled and replaced by decision No. 40, dated 24 August 2016. The new procedure puts forward five possible locations for peaceful assemblies and two routes for demonstrations, including the centre of the city.

4.8 Based on the aforementioned, the author’s claims should be considered as inadmissible and unsubstantiated.

Author’s comments on the State party’s observations

5.1 On 27 April 2017, the author provided her comments on the State party’s observations on admissibility and the merits. The author claims that the request to the Prosecutor General to bring a protest before the Supreme Court can be considered as an ineffective remedy. In any case, she has already petitioned the Prosecutor General, and the petition was rejected.

¹ European Court of Human Rights, *The Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Application No. 6538/74.

Including the prosecutor's office, the author filed complaints at four different levels of the State party authorities and all of them rejected her claims.

5.2 The author submits that the law does indeed allow the local municipalities to regulate peaceful assemblies. The municipalities, however, instead of regulating the way events are organized, regulate the way they are held. The authorities should let the organizers decide the issues of date, time, place, the number of participants, the subjects raised and others. In addition, the local authorities should not have a right to discriminate between "non-governmental" public events and events organized by the authorities themselves, which are held in the centre of the city.

5.3 The State party's arguments that the author's event would somehow impede traffic and access for ambulances are not relevant, since the author asked to hold a single-person picket on a pavement. The restrictions imposed by the Government must be in any case proportionate to the risk posed and the State party, without considering these factors, simply denied the author's request. The author chose the specific location because it was located near the billboard, the text of which the author was planning to protest against. In this scenario, holding the event near a stadium far from the centre is impossible in the present communication.

5.4 The author further submits that the exact same location that she asked to use was earlier used by other groups, such as small and medium-sized business groups and farmers, with large groups of persons participating in the events. When it was necessary, the authorities were able to stop the traffic nearby, such as during sporting events, to provide safe conditions for the participants.

5.5 As stated previously, the law on public events allows the local authorities to regulate the organization of such events, but this does not mean that the law allows them to restrict the location of such events. Article 7 of the law on public events already sets out the list of places where public events are not allowed, such as transportation hubs, the water supply infrastructure and so on. The new decision No. 40 of the municipality of Karaganda, dated 24 August 2016, does not alleviate these concerns. Although that decision is not relevant to the events in question in the present communication, the author submits that the new decision only lists five locations where events can be held.

5.6 The State party authorities refer to a number of public events that were organized as planned. The author, however, submits that there have been multiple cases where the local authorities refused to allow such public gatherings. On 21 May 2016, the authorities refused permission for protests related to so-called land issues. In November 2016, two human rights defenders were sentenced to five years of imprisonment each.

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 claim that the author failed to exhaust domestic remedies by not availing herself of the remaining possibility of requesting the Prosecutor General to intervene and request supervisory review of the court decisions. The Committee recalls its jurisprudence, according to which a petition to a prosecutor's office requesting a review of court decisions that have entered into force depends on the discretionary power of a prosecutor and constitutes an extraordinary remedy. The State party must therefore show that there is a reasonable prospect that such requests would provide an

effective remedy in the circumstances of the case.² The Committee notes that the author lodged petitions for supervisory review with the Office of the Prosecutor General of Kazakhstan and that this petition was dismissed. The Committee considers that the State party has not sufficiently demonstrated that further supervisory review appeals to prosecutorial authorities would have been an effective remedy in the author's case. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee takes note of the author's claims, framed under articles 14 (1), 21³ and 26, read in conjunction with article 2, of the Covenant, that the State party violated her right to an independent judiciary and to peaceful assembly, and that she was discriminated against based on her status as a private citizen. However, the Committee considers that the author has not sufficiently substantiated these claims for the purposes of admissibility, and therefore finds that the claims are inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

6.5 The Committee considers that the author's claims, raising issues under article 19 of the Covenant have been sufficiently substantiated for the purposes of admissibility and 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 claims that her rights to freedom of expression have been restricted, in violation of article 19 of the Covenant, as she was denied permission to organize a peaceful action to protest against the contents of a billboard and was defending her rights to freedom of religion and conscience. It also notes the author's claims that the authorities failed to explain why in her case the restriction on holding a picket was necessary in the interests of national security or public safety, public order, the protection of public health, morals, or the rights and freedoms of others. The Committee notes the State party arguments that the right to pose restrictions on the freedom of assembly is well within the purview of the local authorities and that they were acting in accordance with the law on public events. The Committee further notes the State party's claims that the restrictions as imposed by the local authorities are intended to protect public safety, public order, protection of public health or morals or the protection of the rights and freedoms of others, as well as the functioning of public transportation and other infrastructure items.

7.3 The Committee recalls its general comment No. 34 (2011) in which it states, inter alia, that freedom of expression is essential for any society and constitutes one of the foundation stones for every free and democratic society (para. 2). It notes that article 19 (3) of the Convention allows for certain restrictions on the freedom of expression, including the freedom to impart information and ideas, only to the extent that those restrictions are provided for by law and only if they are necessary (a) for respect for the rights or reputation 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 overbroad in nature – that is, it must be the least intrusive among the measures that might achieve the relevant protective function and be proportionate to the interest to be protected (para. 34). 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.⁴

² *Suleymenova v. Kazakhstan* (CCPR/C/126/D/2416/2014) para. 8.3; *Toregozhina v. Kazakhstan* (CCPR/C/126/D/2311/2013), para. 7.3; and *Insenova v. Kazakhstan* (CCPR/C/126/D/2542/2015 and CCPR/C/126/D/2543/2015), para. 8.3.

³ The Committee further notes its jurisprudence, according to which, one-person pickets normally do not normally fall under article 21 of the Convention on the right of peaceful assembly, but instead are protected by article 19 of the Covenant. See, for example, *Levinov v. Belarus* (CCPR/C/117/D/2082/2011), para. 7.7.

⁴ *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.

7.4 The Committee notes that the refusal to authorize the picket was based on the law on public events and decision No. 3, issued by the municipality of Karaganda on 16 July 2007, which states that the holding of public events is permitted in only one location in the city, near the Liteishik stadium on the outskirts of the city. The Committee observes that limiting the holding of a picket with an expressive purpose to certain predetermined locations does not appear to meet the standards of necessity and proportionality under article 19 of the Covenant.⁵ The Committee further notes that neither the State party nor the national courts have provided an adequate explanation as to how such restrictions were justified in the present case, pursuant to the conditions of necessity and proportionality referred to earlier. The Committee considers that, in the circumstances of the case, the restrictions imposed on the author, although based on domestic law, were not justified for the purposes of article 19 (3) of the Covenant. In the circumstances of the case as submitted by the parties, the Committee concludes that the rights of the author 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 facts before it disclose a violation by the State party of the author's rights under 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. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. To that end, the State party should revise its normative framework on public events, in accordance 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 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.

⁵ See, *inter alia*, *Voronezhstsev et al. v. Belarus* (CCPR/C/132/DR/2561/2015).