



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2156/2012

##### Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	Vladimir Nepomnyaschikh (represented by Leonid Sudalenko)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	22 May 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 11 June 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	10 October 2014
<i>Subject matter:</i>	Arrest for holding peaceful assemblies without prior authorization
<i>Substantive issues:</i>	Right to freedom of expression; permissible restrictions
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	19; 2 (paras. 2 and 3)
<i>Articles of the Optional Protocol:</i>	5 (para. 2 (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 (112th session)**

concerning

#### **Communication No. 2156/2012\***

*Submitted by:* Vladimir Nepomnyaschikh (represented by Leonid Sudalenko)

*Alleged victim:* The author

*State party:* Belarus

*Date of communication:* 22 May 2012 (initial submission)

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

*Meeting on 10 October 2014,*

*Having concluded* its consideration of communication No. 2156/2012, submitted to the Human Rights Committee by Vladimir Nepomnyaschikh 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 Vladimir Nepomnyaschikh, a Belarusian national born in 1952. He claims to be a victim of a violation by Belarus of his rights under article 19, in conjunction with article 2, paragraphs 2 and 3, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992.

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

2.1 On 5 July 2011, the author was orally inviting citizens in a public square of Gomel to participate in a peaceful street rally to take place on 6 July 2011. Shortly thereafter, he was arrested and brought to a police station, where an official record was drawn up, stating

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\* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

that he had committed an administrative offence under article 23.34, part 1, of the Belarus Code of Administrative Offences.<sup>1</sup>

2.2 On 6 July 2011, the Zheleznodorozhny District Court of Gomel found the author guilty of a violation of the established procedure of organizing and holding mass events, under article 23.34, paragraph 1, of the Code of Administrative Offences, and fined him 350,000 Belarusian roubles. On 3 August 2011, the Gomel Regional Court rejected the author's appeal against the District Court's decision, which became final on the same date.

2.3 The author's requests to initiate supervisory review proceedings were dismissed by the Chairperson of the Gomel Regional Court on 26 October 2011 and by a deputy chairperson of the Supreme Court on 1 December 2011.

2.4 On 7 October 2011, the author was distributing leaflets with information about a peaceful gathering in Gomel dedicated to the social and economic situation in Belarus. The gathering was set to take place on 8 October 2011. Yet again, he was arrested and brought to a police station, where a record that he had committed an administrative offence under article 23.34, paragraph 1, of the Code of Administrative Offences was drawn up.

2.5 On 10 October 2011, the Tsentralny District Court of Gomel found the author guilty under article 23.34, paragraph 1, of the Code of Administrative Offences, and fined him 175,000 Belarusian roubles. On 4 November 2011, the Gomel Regional Court rejected his appeal against the District Court's decision, which became final on the same date.

2.6 On 4 January 2012, the Chairperson of the Gomel Regional Court dismissed the author's requests to initiate supervisory review proceedings against the Tsentralny District Court's decision of 10 October 2011. On 1 December 2011, the author's complaint to the Supreme Court under the supervisory review proceedings had been rejected by decision of a deputy chairperson of the Supreme Court.

2.7 The author submits that, in both cases, the State party's courts have established that he acted contrary to the requirements of articles 8 and 10 of the Law on Mass Events of 30 December 1997. Under those provisions, an organizer of a mass event does not have a right to publicly announce the date, place and time of the event in the media, or to produce and disseminate leaflets, posters or other information materials for that purpose, prior to obtaining official authorization to hold the mass event in question. Holding a peaceful assembly without authorization is punishable both under administrative and criminal law. Since, in both cases, the author was informing citizens of upcoming peaceful gatherings for which he had not obtained prior authorization, the domestic courts considered that he had breached the law.

2.8 He further submits that the domestic courts did not provide any explanation as to why it was necessary to restrict his right to impart information, orally and in writing, for one of the legitimate aims enumerated in article 19, paragraph 3, of the Covenant.

2.9 The author submits that he has exhausted all available domestic remedies. He has not requested the Office of the Procurator-General to initiate supervisory review proceedings, as only a cassation appeal can lead to a re-examination of a case. A request for supervisory review is not an effective remedy, because it is dependent on the discretionary power of a limited number of officials and would not lead to the re-examination of a case.

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<sup>1</sup> Article 23.34, paragraph 1, of the Code of Administrative Offences reads: "Violation of the established procedure of organizing or conducting mass events or pickets. Violation of the established procedure of organizing or holding assemblies, meetings, rallies, demonstrations or other mass events or pickets, is punishable by a warning, or a fine of up to 10 minimum wages, or by administrative arrest."

The supervisory review is restricted to legal issues and does not permit any review of facts and evidence. According to the Committee's jurisprudence, domestic remedies should be both available and effective. Furthermore, the Committee has established that in States parties where the initiation of supervisory review proceedings is dependent on the discretionary power of a judge or prosecutor, the remedies to be exhausted are limited to the cassation appeal.<sup>2</sup>

### **The complaint**

3.1 The author claims that the imposition of a fine in his case was not necessary for the protection of national security, public order, public health or morals or for respect of the rights and reputation of others, and therefore amounts to a violation of his rights under article 19, paragraphs 1 and 2, in conjunction with article 2, paragraphs 2 and 3, of the Covenant.

3.2 He also claims that his argumentation about the unlawfulness of the administrative penalty is supported by the Committee's Views in communication No. 780/1997, *Laptsevich v. Belarus*. He adds that the provisions of the Law on Mass Events, which restrict the right to freely impart information, run counter to the State party's international obligations, because the restrictions in question do not meet the requirement of necessity under article 19, paragraph 3, of the Covenant.

3.3 He asks the Committee to declare his case admissible, consider it on the merits and establish a violation, by the State party, of his rights under the Covenant. He requests reimbursement of costs and expenses incurred in connection with the case. He also asks the Committee to recommend that the State party review its legislation, in particular articles 8 and 10 of the Law on Mass Events, and bring those articles into line with the State party's international obligations, in particular articles 19 and 21 of the Covenant.

### **State party's observations on admissibility**

4.1 On 13 August 2012, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust all available domestic remedies. First, as the author himself admits, he has not requested the Office of the Procurator-General to initiate supervisory review proceedings. Second, he has not requested the Chairperson of the Supreme Court to reconsider the decision of the deputy chairperson of the Supreme Court, dated 1 December 2011, to reject his request for supervisory review.

4.2 The State party considers the communication as registered in violation of article 2 of the Optional Protocol. It submits that it "has discontinued proceedings regarding the communication and will dissociate itself from the views that might be adopted thereon by the Committee".

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

5.1 On 4 September 2012, the author challenged the State party's argumentation regarding the admissibility and registration of his communication. He submits that, in line with the Committee's jurisprudence, authors are requested to exhaust domestic remedies which are not only available but also effective. He adds that remedies are effective if they offer a reasonable prospect of obtaining effective redress. In this regard, the Committee held on numerous occasions that "supervisory review is a discretionary review process

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<sup>2</sup> Reference is made to communication No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011.

common in former Soviet Republics, which the Committee has previously considered not to constitute an effective remedy for the purposes of exhaustion of domestic remedies”.<sup>3</sup>

5.2 The author reiterates that he has not applied to the Office of the Procurator-General under the supervisory review procedure because only the cassation appeal would result in a substantive review of his case. An application for supervisory review cannot, therefore, be considered as an effective remedy. Furthermore, such an application is examined by the prosecutor unilaterally, is limited to procedural issues and does not permit any review of facts and evidence.

5.3 The author adds that, pursuant to the national legislation on administrative law, an application for supervisory review of a court ruling in an administrative case must be made within six months after the ruling is pronounced. It is virtually impossible to comply with this timeline, because applications first have to be filed with the Chairperson of the Regional Court and only then with the Chairperson of the Supreme Court, where they are examined, in turn, by the latter’s deputies. Similarly, applications for supervisory review first have to be filed with the Regional Prosecutor’s Office, before they reach the Office of the Procurator- General, where they are examined by the deputies of the Procurator-General. Applications in administrative cases filed after the expiration of the six-month timeline are dismissed without examination.

5.4 Further, the author argues that by becoming a party to the Optional Protocol, the State party recognized the Committee’s competence to consider individual communications to determine whether there has been a violation of the Covenant and, in line with article 40, paragraph 4, of the Covenant, its competence to transmit its reports and general comments, as it may consider appropriate, to the State parties. Under article 2 of the Covenant, the State party undertook to ensure that any person subject to its jurisdiction would be provided with an effective remedy. Having recognized the Committee’s competence to determine the effectiveness of domestic remedies in individual communications, the State party is under an obligation not only to comply with the provisions of the Covenant and its Optional Protocol, but also to take into account the Committee’s general comments. The Committee’s integral role under the Covenant includes the interpretation of its provisions and the development of jurisprudence.<sup>4</sup> Therefore, by refusing to recognize the Committee’s standards, practice, working methods and case law, the State party denies its competence to interpret provisions of the Covenant, which runs counter to its object and purpose. The author maintains that the State party must not only implement the Committee’s decisions, but also recognize its standards, practice, working methods and case law, by virtue of the international law principle of *pacta sunt servanda*.

#### **State party’s further submission**

6. On 4 January 2013, the State party reiterated its position of 13 August 2012 regarding the communication.

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<sup>3</sup> Reference is made to communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009, and the European Court of Human Rights, Application No. 47033/99, *Tumilovich v. Russia*, decision of 22 June 1999.

<sup>4</sup> Reference is made to Committee’s general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, paras. 11 and 13.

## Issues and proceedings before the Committee

### *Lack of cooperation by the State party*

7.1 The Committee notes the State party's assertion that there are no legal grounds for consideration of the author's communication, insofar as it was registered in violation of the provisions of the Optional Protocol; that it has no obligation to recognize the Committee's rules of procedure nor the Committee's interpretation of the provisions of the Optional Protocol; and that any decision taken by the Committee on the present communication will be considered "invalid" by its authorities.

7.2 The Committee recalls that under article 39, paragraph 2, of the Covenant, it is empowered to establish its own rules of procedure, which States parties have agreed to recognize. It further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1 of the Optional Protocol). Implicit in a State's adherence to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination thereof, to forward its Views to the State party and the individual (art. 5, paras. 1 and 4). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.<sup>5</sup> It is up to the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication should be registered and by declaring beforehand that it will not accept the Committee's determination on the admissibility or the merits of the communication, the State party is violating its obligations under article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>6</sup>

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's contention that the author should have requested the Office of the Prosecutor-General, and the Chairperson of the Supreme Court, to initiate a supervisory review of the decisions of the district courts and the Regional Court. It also takes note of the author's explanation that supervisory review proceedings are neither effective nor accessible. The Committee recalls its jurisprudence according to which a petition for supervisory review to a prosecutor's office against a judgement having the force of *res judicata* does not constitute an effective remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. It also considers that filing requests for supervisory review to the chairperson of a court that are directed against

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<sup>5</sup> See, *inter alia*, communication No. 869/1999, *Piandiong et al. v. Philippines*, Views adopted on 19 October 2000, para. 5.1.

<sup>6</sup> See also communication No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, paras. 8.1 and 8.2; or communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, paras. 5.1. and 5.2.

court decisions which have entered into force and that 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 State party has not shown, however, whether and in how many cases a petition to the Chairperson of the Supreme Court for supervisory review procedures was applied successfully in cases concerning the right to freedom of expression. In such circumstances the Committee finds that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

8.4 The Committee notes the author's claim that his rights under article 19, paragraph 1, of the Covenant have been violated. It notes, however, that the author has not provided any explanation in this connection. In the circumstances, the Committee considers that he has failed to sufficiently substantiate this particular claim for purposes of admissibility, and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.5 The Committee further notes the claim the author has made under article 19, read together with article 2, paragraph 2, of the Covenant, without providing further explanations thereon. In the circumstances, the Committee considers that the author has failed to sufficiently substantiate his claim, for purposes of admissibility, and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

8.6 The Committee considers that the author has sufficiently substantiated his claim under article 19, paragraph 2, in conjunction with article 2, paragraph 3, of the Covenant, for purposes of admissibility. Accordingly, 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 communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2. The Committee notes the author's claim that the administrative penalty imposed on him, for orally calling citizens to participate in an upcoming peaceful street rally and for distributing leaflets containing information about an upcoming peaceful gathering prior to obtaining official authorization to hold the events in question as required under the domestic law, constitutes an unjustified restriction on his freedom to impart information, as protected by article 19, paragraph 2, of the Covenant. It also notes that the State party has not provided any justification as to the necessity to restrict the author's rights in the case at issue.

9.3 The Committee has to consider whether the restrictions imposed on the author's right to freedom of expression are justified under any of the criteria set out in article 19, paragraph 3. The Committee observes that article 19 provides for certain restrictions but only as provided by law and necessary: (a) for respect of the rights and reputation of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. It recalls that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person; such freedoms are essential for any society and constitute the foundation stone for every free and democratic society.<sup>7</sup> Any restrictions to the exercise of such freedoms must conform to strict tests of necessity

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<sup>7</sup> See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2.

and proportionality, must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.<sup>8</sup>

9.4 In this regard, the Committee notes that the State party has not attempted to address the restrictions imposed in the author's case and, in particular, to explain why it was necessary, under domestic law and for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant, to obtain authorization prior to disseminating information, orally and in writing, about the upcoming peaceful gatherings. In the absence of any other pertinent explanations from the State party, the Committee gives due weight to the author's argumentation, which is confirmed by the court decisions made available to it, that no explanation was provided by the domestic courts as to the necessity to restrict his right to impart information, in line with article 19, paragraph 3, of the Covenant.

9.5 In the light of the above, the Committee concludes that the author's rights under article 19, paragraph 2, of the Covenant, in conjunction with article 2, paragraph 3, of the Covenant, did not receive effective protection. Accordingly, the Committee finds that the facts as submitted reveal a violation, by the State party, of the author's rights under article 19, paragraph 2, in conjunction with article 2, paragraph 3, of the Covenant.

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 as submitted reveal a violation of the author's rights under article 19, paragraph 2, in conjunction with article 2, paragraph 3, 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 reimbursement of the legal costs incurred by the author, as well as adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the Committee reiterates that State party should review its legislation, in particular, the Law on Mass Events of 30 December 1997, as it has been applied in the present case, with a view to ensuring that the rights under article 19 of the Covenant may be fully enjoyed in the State party.

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 or not 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 Belarusian and Russian in the State party.

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<sup>8</sup> Ibid., para. 22.