



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2140/2012\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	I.T. (represented by counsel, Viktoria Tyuleneva)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	23 January 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 19 March 2012 (not issued in document form)
<i>Date of adoption of decision:</i>	28 March 2017
<i>Subject matter:</i>	Fine for non-respect of residency registration rules
<i>Procedural issue:</i>	None
<i>Substantive issues:</i>	Freedom of movement; right to privacy
<i>Articles of the Covenant:</i>	12 (1) and 17 (1)
<i>Article of the Optional Protocol:</i>	2

1. The author of the communication is I.T., a citizen of Mali, born in 1967. He claims to be a victim of a violation, by Kazakhstan, of his rights under articles 12 (1) and 17 (1) of the Covenant. The Optional Protocol entered into force for the State party on 30 September 2009. The author is represented by counsel, Viktoria Tyuleneva.

#### The facts as submitted by the author

2.1 The author submits that he first arrived in Kazakhstan (then the Kazakh Soviet Socialist Republic) in 1989 on an exchange programme for students to train at the Almaty

\* Adopted by the Committee at its 119th session (6-29 March 2017).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

\*\*\* A joint individual opinion by Committee members Olivier de Frouville and Sarah Cleveland is annexed to the present decision.



Veterinary Institute. After graduating in 1996, he remained in Kazakhstan. Between 2001 and 2003, he headed the Union of Africans in Kazakhstan, a non-governmental organization, the main purpose of which was the protection of the rights of all Africans in Kazakhstan.

2.2 In 2004, the author received a residence permit, valid until 2009, issued by the migration police under the Department of Internal Affairs of Almaty. Under the law, anyone in Kazakhstan is to duly register their address of residence with the local Department of Internal Affairs. This general rule also applies to foreigners having a residence in Kazakhstan. In practice, a foreigner may register as an address either a home that he or she owns, or a rented house or apartment. In the latter case, in addition to renting out the property, the owner also must give consent for the foreigner's registration.

2.3 The author rented an apartment, but the owner refused to give him consent to register at the respective address. As a consequence, the author registered with the address of the apartment of a friend, who gave him his consent. The author was not living at that address, but maintained regular contact with his friend, who handled the author's incoming mail. Thus, according to the author, he had provided the Kazakh authorities with an official address for contact.

2.4 On 11 August 2009, the author sought to have his residence permit renewed by the migration police in Almaty. He was issued a certificate, signed by the Deputy Chief of the migration police, in which it was stated that "the application for renewal of the residence permit is under consideration by the migration police of the Department of Internal Affairs of Almaty". Kazakh legislation requires the migration police to issue to a foreigner a new residence permit within two months following the receipt of the application.

2.5 Since the migration police did not inform the author of the outcome of his application, he requested legal assistance from the Kazakhstan International Bureau for Human Rights and Rule of Law. The Bureau inquired with the migration police and received a reply, dated 3 November 2009, that the author would be issued a new residence permit but that his administrative responsibility had to be engaged under article 394 of the code of administrative violations.<sup>1</sup>

2.6 The author maintains that the migration police conditioned issuing him a residence permit on his admitting to have committed an administrative offence and paying a fine. He claims that he wanted to appeal the ruling by which he was convicted of an administrative offence in court without fearing that he would be denied a residence permit and contends that he believed that the migration police was trying to intimidate him by withholding his residence permit.

2.7 On 20 November 2009, the author filed an appeal against the ruling of the migration police before the Almalinsky court, claiming that the condition that the police had imposed on him for the granting of a residence permit was impossible to fulfil. On 25 December 2009, the migration police decided to issue a new residence permit to the author free of conditions and the author withdrew his court case on 12 January 2010. He received his residence permit, valid until 20 July 2014, on 4 March 2010.

2.8 The author submits that for a period of six months, while he was waiting for a new residence permit to be issued, he could not move freely within the territory of Kazakhstan, since domestic legislation required him to have a residence permit or a national passport with a valid Kazakh visa and a migration card, confirming his registration as a foreigner. The migration police had not issued a visa or migration card for the author during the consideration of his application for a new permit.

2.9 On 10 May 2010, the author received a call from a bailiff, who said that he had been instructed to collect a fine from the author for a violation of article 394 of the code of administrative violations. On 12 May 2010, the author met with the bailiff and was served a copy of an administrative ruling, issued on 9 November 2009 by the Head of the Almaty

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<sup>1</sup> Article 394 on, inter alia, violation by a foreigner or a person without citizenship of the rules of stay in Kazakhstan, committed through non-compliance with the established procedure for the registration, movement or choice of a place of residence.

migration police, imposing an administrative penalty on him for violating article 394 of the code. The bailiff also stated that since the author had not paid the fine voluntarily, on 26 January 2010 a judge of the Specialized Interregional Administrative Court of Almaty had ordered a forced recovery of the fine, amounting to the equivalent of \$85.

2.10 On 17 May 2010, counsel for the author filed a request with the migration police to provide him with the original version of the administrative ruling, in order to allow him to appeal it in court. The document was provided to counsel on 29 July 2010 and on 30 July 2010 the author filed an appeal against the ruling before the Specialized Interregional Administrative Court. On 2 August 2010, the court rejected his appeal. Further attempts to petition the Office of the General Prosecutor and the Almaty Prosecutor for supervisory review of the decision also failed. The author contends that he has exhausted all available and effective domestic remedies.

2.11 On 19 October 2010, the author inquired with the migration police in Almaty whether he should request from them permission for his movement within the city of Almaty, as well as for trips outside the city limits. He received a reply, dated 26 October 2010, stating that he must notify the migration police of any change of his residential address, as well as notify the police of any trip outside the city of Almaty that was longer than 10 days. The author maintains that the need to notify the police about all his movements within the city and outside it, as well as the established practice of holding foreigners responsible for not living at their place of registration, are incompatible with the freedom of movement and residence of foreigners lawfully present in Kazakhstan.

### **The complaint**

3.1 The author claims that he was in Kazakhstan legally because he had a valid residence permit and, consequently, article 12 (1) of the Covenant fully applied to him and he was entitled to freedom of movement within the country without having to seek special permission from the authorities and without any hindrance from the State party. He submits that the requirement to register an address is not a restriction within the meaning of article 12 of the Covenant, but the practice of bringing a foreigner to account for living at an address other than the one at which he or she is registered is not compatible with the concept of the freedom to choose one's residence and is an illegal restriction within the meaning of article 12.

3.2 The author also submits that his living at an address that was different from the address of registration did not threaten national security or public safety, public order, health, morals or the rights and freedoms of others. Therefore, he considers that being subjected to measures of administrative responsibility constitutes a disproportionate measure and cannot be considered a legitimate limitation within the meaning of article 12 of the Covenant.

3.3 The author further claims that the requirement for foreigners to notify the migration police of all their movements within the city and outside it is incompatible with the notion of freedom of movement and violates his rights under article 17 of the Covenant. He also maintains that the above requirement is not imposed by a law, but by an instruction that had been enacted before the entry into force in the State party of the Optional Protocol to the Covenant, and that it amounts to police control over foreigners and to disproportionate interference in their private lives.

### **State party's observations on the merits**

4.1 In notes verbales dated 19 June and 8 November 2012, the State party provided its comments on the merits of the present communication. The State party explains that in accordance with article 16 of the law on the legal status of foreigners and article 5 of the law on migration, foreigners have a right of free movement within the territory of Kazakhstan and have a right to choose their place of residence.

4.2 According to article 77 of instruction No. 215 of 9 April 2004, all foreigners must be registered at their place of residence. This does not limit their freedom of movement, since the persons can first move to their place of residence and then have the residence registered.

4.3 In addition, this requirement is applicable not only to foreigners, but also to citizens of Kazakhstan. In accordance with government resolution No. 1063 of 12 July 2000, every citizen of Kazakhstan, foreigner and stateless person must register at his or her place of permanent residence.

4.4 The State party concludes that in the light of the above it appears that the author's contentions regarding violations of articles of the Covenant are without merit.

#### **Additional observations by the author**

5.1 In submissions dated 4 September 2012 and 21 January 2013, the author states that, despite the State party's contentions, the system of address registration as implemented violates the provisions of the Covenant, as described in his initial complaint. The author concedes the need of the State party to have this system in place. Such a system can help the authorities for planning purposes or in the provision of social security services and the issuance of identification documents.

5.2 The author, however, argues that the State party violated his rights because he was subjected to an administrative fine for failure to reside at his registered address. Article 12 (3) of the Covenant lists restrictions that the State party can impose on freedoms listed in article 12 (1). The author contends that the restriction imposed on him by the State party does not fall under any of the legitimate restrictions allowed by the Covenant. The restrictions imposed by the State party should not undermine the essence of the right itself. As in this case, the State party claims to recognize the right to freedom of movement, but imposes a fine on the author for choosing to reside at a place different from the location at which he was registered.

5.3 The author argues that the registration information is used by the State party to establish police control of the places of residence of foreigners. Such control, in practice, consists of entering the foreigners' places of residence and demanding their identification documents. In addition to interference with the freedom of movement, such intrusions violate provisions contained in article 17 (1) of 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 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

6.2 The Committee has ascertained, in accordance with 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 author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee has noted the author's claims under article 12 (1) of the Covenant (see paras. 3.1 and 3.2 above). It notes, however, that the author, a foreign resident, did not register his true place of residence, as required under domestic law, and was fined as a consequence. The Committee also observes that, in the circumstances of the case, the fine imposed on the author cannot be described, in itself, as an unreasonable restriction on the author's freedom of movement. The Committee notes in this regard that the author's residence permit was renewed before the fine was paid. Accordingly, in the particular circumstances of the case, and in the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate his claims for the purposes of admissibility. Therefore, the Committee considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee has further noted the author's claims under article 17 (1) of the Covenant (see paragraph 3.3 above). However, and in the absence of any further

information or explanation on file, the Committee considers that the author has failed to substantiate his allegations for the purposes of admissibility. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the author.

## Annex

[Original: French]

### **Dissenting opinion by Olivier de Frouville and Sarah Cleveland**

1. The Committee considered this communication inadmissible on the grounds that the author allegedly failed to sufficiently substantiate his grievances in accordance with articles 12 and 17 of the Covenant. We disagree with that finding in the case of article 12.
2. We consider that any system that on the one hand obliges all persons legally resident in the country to register their address with the police and on the other hand imposes a penalty — however modest — on any person found to reside at a different address from that registered, constitutes a restriction on the freedom of choice of place of residence and liberty of movement within the territory of the State concerned. Such a restriction may be considered legitimate if it serves the aims of public order, as listed in article 12 (3), and if it is necessary within a democratic society to the legitimate aim pursued. In other words, it is up to the State party to show to what extent such a measure, which amounts to a form of police control over the population, meets an imperative social requirement and represents the least restrictive measure available to achieve a purpose that is in the public interest.
3. In the present case, however, the State has by no means shown this to be so. It merely describes the system and defends its legitimacy in general, while insisting on the fact that it applies equally to Kazakh nationals and to foreigners. It does not say what legitimate purpose is served by the fine, nor does it explain in what way inflicting a fine on the author was necessary to the pursuit of public order.
4. This is not the first time the Committee has had to look into a system of compulsory registration of the place of residence applied in the State party. Twice before it has expressed its concern regarding such a system, in connection with article 12. Recently, in the final observations it adopted on the second periodic report in 2016 (see CCPR/C/KAZ/CO/2, paras. 41 and 42), the Committee took up the following position:

“The Committee remains concerned (see CCPR/C/KAZ/CO/1, para. 18) about the compulsory residence registration system that is currently in force. While noting the State party’s argument that such registration is for statistical purposes and not contingent on any conditions, the Committee observes that failure to comply with registration obligations constitutes an administrative offence that can be sanctioned with a fine or administrative arrest for a period from 10 days to 3 months (art. 12).”
5. The Committee therefore recommended that the State party “should bring its compulsory residence registration system into full compliance with the Covenant”.
6. In view of that position, it is surprising that the Committee did not object to the fact that the author was fined 85 dollars for having failed to give the police his proper address, although he had supplied an address that allowed the authorities to contact him, a fact which he maintained had not been contested by the State party. It was also odd that the Committee — in the absence of any explanation by the State party — had not reacted to the author’s allegations that he had been instructed to notify the migration police if he left Almaty for longer than 10 days (para. 2.11).
7. The current registration system draws a distinction between nationals and foreigners, insofar as foreign tenants, unlike national tenants, are not allowed to notify the police of their address without their landlord’s consent. Yet in the case in hand it was precisely because he had not obtained that consent that the author had been obliged to give an address which was different from his place of residence. The State party had not explained what justified this difference of treatment between nationals and foreigners lawfully residing within the country.
8. In the absence of any satisfactory explanation by the State party as to what justified such a restriction on a right recognized by the Covenant, it was not up to the Committee in

the place of the State party to speculate on any such justifications. And yet it is just this sort of speculation that the Committee puts forward in its decision of inadmissibility, by drawing attention in particular to the fact that the author was a foreigner, implying thereby that it was legitimate in general for the State to exert police control over foreigners even when lawfully resident within the country.

9. In general comment No. 27 (1999) on freedom of movement, however, the Committee considered that: “Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3” (para. 4).

10. The Committee also appears to draw attention to two further points: the cheapness of the fine and the fact that the author apparently did not comply with the law in force. It is true that the fine did not amount to very much, even though it may be noted that, compared with the average wage in Kazakhstan, 85 dollars represents a non-negligible sum. But although the doctrine of *de minimis non curat praetor* has recently been incorporated in two international instruments (Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights), it is not taken into account in the Optional Protocol to the International Covenant on Civil and Political Rights and the Committee has never used it. The limited amount of the fine cannot, as such, be used as an argument for the inadmissibility of the complaint. Similarly, inadmissibility cannot be founded on the consideration that the author has infringed the law of the country, since the “clean hands” doctrine is not applied before the Committee, nor indeed before any other international juridical bodies, especially since there is good reason to doubt whether domestic law fully complies with article 12 of the Covenant, as the Committee indeed pointed out in the aforementioned concluding observations. The fact that the author may have committed an offence under domestic law does not mean that the latter complies with the Covenant and does not dispense the State party from having to justify any restrictions on the exercise of rights guaranteed under article 12.

11. Lastly, we fail to see how the decision taken by the Committee in the present case is compatible with that taken in its Views in the case of *Ory v. France*.<sup>a</sup> In that case, the author had been ordered to pay a fine of 150 euros (reduced to 50 euros on appeal) on the grounds that under French law all persons who did not have a fixed residence for more than six months were required to obtain a “travel card”, which had to be stamped every three months in order for them to be able to travel in France. The Committee considered that this condition clearly placed a restriction on the exercise of the right to liberty of movement under article 12 (1) (para. 8.3). It found merely that the restriction was “established under the Act” (para. 8.4). It noted that according to the State party the objective of these measures was to help to maintain public order. It then went on to assess whether the restriction was “necessary and proportionate to the aim pursued”. In that respect it recognized “the State party’s need to check, for the purposes of maintaining security and public order, that persons who regularly change their place of residence are and remain identifiable and contactable”. Nevertheless, in paragraph 8.5 of its Views, it found a violation of article 12 in the following terms:

“The Committee observes, however, that the State party has not demonstrated that the obligation to have the travel card stamped at frequent intervals or to make failure to fulfil that obligation subject to criminal charges (Decree No. 70-708 of 31 July 1970, art. 20) are measures that are necessary and proportionate to the end that is sought. The Committee concludes that this restriction of the author’s right to liberty of movement is not compatible with the conditions set forth in article 12, paragraph 3, and consequently constitutes a violation of article 12, paragraph 1, in his regard.”

12. In paragraph 10 of the same Views, therefore, and pursuant to article 2 (3) (a), of the Covenant, the Committee stated that the State party was required to: “provide the author

<sup>a</sup> Communication No. 1960/2010; Views adopted on 28 March 2014.

with an effective remedy by, inter alia, expunging his criminal record and providing him with adequate compensation for the harm suffered, and to review the relevant legislation and its application in practice, taking into account its obligations under the Covenant”.

13. In the *Ory* case, the State party had taken the trouble to explain the reasons why it considered that the restriction imposed on freedom of movement was justified by the pursuit of a legitimate aim, namely the maintenance of public order. In the present case, Kazakhstan has not made the effort to argue likewise. In both cases, the amount of the fine was modest (rather lower in the French case than the Kazakh one). In both cases, the registration system restricted the freedom of movement of the authors. In the *Ory* case, the author was a citizen of the State party, whereas in the present case, the author is a foreigner, but lawfully resident and hence entitled to full freedom of movement within the country. In the end, and in the absence of any satisfactory explanation by the State party, the differences between the two cases appear hardly significant, certainly not enough to justify finding a violation in one case and arriving at a decision of inadmissibility in the other.

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