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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2153/2012

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

Submitted by:	Sergey Kalyakin (represented by Leonid Sudalenko)
Alleged victims:	The author, Viktor Korneenko, Valery Ukhnalev, Aleksandr Bukhvostov, Vladimir Katsora, Zinaida Shumilina, Galina Skorokhod, Vladimir Sekerko, Valery Klimov, Marina Smyaglikova, Vladimir Zhoglo, Lyudmila Kobylyanets, Vladimir Myshak, Svetlana Mikhalchenko, Nikolay Pokhabov, Evgeny Rogin, Dmitry Oparenko, Iosif Nechay, Pavel Stanevsky, Viktor Mikhalchik and Anatoly Ivanchik
State party:	Belarus
Date of communication:	15 November 2011 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 May 2012 (not issued in document form)
Date of adoption of views:	10 October 2014
Subject matter:	Refusal to register a non-governmental organization
Substantive issues:	Right to freedom of association; permissible restrictions
Procedural issues:	Exhaustion of domestic remedies
Articles of the Covenant:	22
Articles of the Optional Protocol:	5, para. 2 (b)

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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. 2153/2012*

Submitted by:	Sergey Kalyakin (represented by Leonid Sudalenko)
Alleged victims:	The author, Viktor Korneenko, Valery Ukhnalev, Aleksandr Bukhvostov, Vladimir Katsora, Zinaida Shumilina, Galina Skorokhod, Vladimir Sekerko, Valery Klimov, Marina Smyaglikova, Vladimir Zhoglo, Lyudmila Kobylyanets, Vladimir Myshak, Svetlana Mikhalchenko, Nikolay Pokhabov, Evgeny Rogin, Dmitry Oparenko, Iosif Nechay, Pavel Stanevsky, Viktor Mikhalchik and Anatoly Ivanchik
State party:	Belarus
Date of communication:	15 November 2011 (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. 2153/2012, submitted to the Human Rights Committee by Sergey Kalyakin et al. 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 Sergey Kalyakin, a Belarusian national born in 1952. He submits the communication on his own behalf and on behalf of 20 other

* The following members of the Committee participated in the examination 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, Fabian Omar Salvioli, Dheerujlall B. Seetulsingh, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

Belarusian citizens, all residing in Belarus.[1] He claims that they are all victims of violations by Belarus of article 22, paragraphs 1 and 2, read in conjunction with article 2, paragraph 2, 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 submitted by the author

2.1 On 24 June 2011, as members of the council of the association that they had founded together, the author and two of the alleged victims submitted an application to the Ministry of Justice for registration of a non-governmental human rights association, "For Fair Elections".

2.2 On 21 July 2011, the Ministry of Justice denied registration on the grounds that the application was not in compliance with the requirements of article 15, paragraph 3, of the Law on Public Associations of 4 October 1994.[2] In particular, the Ministry of Justice claimed that it had not been provided with a list of the founders of the association; that the record of its constituent assembly had not been signed by the chair; and that there were some concerns with regard to a letter of guarantee confirming the allocation of office space to the association.

2.3 On an unspecified date, the author and the alleged victims filed a complaint against the decision of the Ministry of Justice at the Supreme Court. They claimed that the arguments of the Ministry of Justice were factitious and based on allegations, rather than facts, and that in fact, the denial was groundless and unlawful. They argued that the constituent assembly had been held in compliance with the Law on Public Associations and that they had submitted all the necessary documents to register the association.

2.4 On 21 September 2011, the Supreme Court rejected the claim on grounds similar to those relied on by the Ministry of Justice. The Supreme Court did not specify which legitimate aims required the imposition of restrictions on the rights of the author and the alleged victims. The decision became final on the same date. The author claims that the decisions of the Supreme Court are not subject to appeal, as the Supreme Court is the highest court in Belarus, and adds that domestic law does not provide for a right of individual petition to the Constitutional Court.

2.5 On 5 March 2013, the Prosecutor General's Office dismissed the author's request, submitted on 23 April 2012, to initiate a supervisory review of the decision of the Supreme Court of 21 September 2011. In that connection, the author submits that the supervisory review cannot be considered an effective remedy, because its initiation is dependent on the discretionary power of a judge or prosecutor. He refers to the Committee's jurisprudence to the effect that domestic remedies should be both available and effective.

2.6 The author submits that domestic remedies have been exhausted.

The complaint

3.1 The author claims that the refusal to register the human rights association was not necessary in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others, and therefore amounts to a violation of his rights and those of the alleged victims under article 22, paragraph 2, read in conjunction with article 2, paragraph 2, of the Covenant.

[1] The author has a signed authorization to act on behalf of all 20 co-authors.

[2] Available from http://www.legislationline.org/topics/country/42/topic/1.

3.2 He submits that the Supreme Court failed to assess his claim, bearing in mind the provisions of the Covenant. Pursuant to articles 26 and 27 of the Vienna Convention on the Law of Treaties of 1969, Belarus is bound by the Covenant, it should perform it in good faith and it may not invoke the provisions of its internal law as justification for its failure to perform the Covenant. According to article 33 of the Belarusian Law on International Treaties, universally recognized principles of international law and provisions of international treaties in force in respect of Belarus form an integral part of domestic law. According to article 20 of the Universal Declaration of Human Rights, everyone has the right to freedom of peaceful assembly and association. The right to freedom of association is enshrined in article 22 of the Covenant and can only be restricted for one of the legitimate aims contained therein.

3.3 The author claims that the interference by the State party with his and the alleged victims' right to freedom of association on the ground that they failed to comply with the procedure for registration of public associations, established under the Law on Public Associations, was not justified by any of the legitimate aims contained in article 22, paragraph 2, of the Covenant.

3.4 The author further refers to article 7 of the Constitution of Belarus, according to which Belarus is bound by the principle of the rule of law. Belarus recognizes the priority of universally recognized principles of international law and ensures the compliance of its legislation with such principles. By becoming a party to the Covenant, Belarus undertook to respect and ensure the rights enshrined therein and to take legislative and other measures, which would be necessary to give effect to those rights. The author refers to the Committee's jurisprudence in *Park* v. *Republic of Korea* in support of his argument about the priority over its domestic law of the obligations of the State party under the Covenant.[3] He emphasizes that Belarus has not made a declaration under article 4 of the Covenant on the existence of a public emergency and that it was derogating from certain rights set out in the Covenant on that basis.

3.5 The author adds that, since 2006, domestic law has imposed criminal liability for operating unregistered organizations. He claims therefore that he and the alleged victims could be subject to criminal liability should they pursue their activities jointly with other members of the association, as reflected in its statutes.

State party's observations on admissibility

4. On 19 July 2012, the State party challenged the admissibility of the communication. It argues that the communication was not submitted by the author but by a third party on his behalf. It also argues that the domestic remedies have not been exhausted, as the author has admitted that he did not request the Prosecutor General to initiate a supervisory review of the decision of the Supreme Court of 21 September 2011.[4] The State Party therefore considers that the communication was registered in violation of articles 1 and 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 on it by the Committee."

[3] Communication No. 628/1995, *Tae Hoon Park* v. *Republic of Korea*, Views adopted on 20 October 1998, para. 10.4.

[4] While the State party argues to the contrary, the author and two of the alleged victims submitted a request for a supervisory review on 23 April 2012, which was rejected on 5 March 2013 (see para. 2.5 above).

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

5.1 On 4 September 2012, the author questioned the argumentation of the State party regarding the admissibility and registration of the 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. Remedies are effective if they offer a reasonable prospect of obtaining effective redress. In that regard, the author notes that the Committee has held on numerous occasions that a supervisory review is a discretionary review process, which does not constitute an effective remedy for the purposes of exhaustion of domestic remedies.[5]

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

5.3 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. Under article 2 of the Covenant, the State party undertook to ensure that any person within its jurisdiction should 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.[6] By refusing to recognize the Committee's standards, practices, working methods and case law, the State party therefore denies its competence to interpret the 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, practices, working methods and case law, by virtue of the international law principle of *pacta sunt servanda*.

State party's additional observations on admissibility

6. On 4 January 2013, the State party reiterated its position of 19 July 2012 regarding the communication.

Issues and proceedings before the Committee

The State party's lack of cooperation

7.1 The Committee notes the submission of the State party that there are no legal grounds for the consideration of the present communication, insofar as it was registered in violation of articles 1 and 2 of the Optional Protocol, because it was submitted by a third party (a lawyer) on behalf of the author and the alleged victims, claiming a violation of

[5] Reference is made to communication No. 1418/2005, *Iskiyaev* v. *Uzbekistan*, Views adopted on 20 March 2009 and to European Court of Human Rights decision No. 47033/99, *Tumilovich* v. *Russia*, of 22 June 1999.

[6] Reference is made to the 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.

their rights, and because domestic remedies have not been exhausted. It notes the statement of the State party that it will "dissociate" itself from the decision of the Committee regarding the communication.

7.2 The Committee recalls that article 39, paragraph 2, of the Covenant authorizes it to establish its own rules of procedure, which the States parties to the Covenant have agreed to recognize. 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 article 1). Implicit in the adherence of a State to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination, to forward its views to the State party and to the individual (article 5, paragraphs 1 and 4, of the Optional Protocol). 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 a communication and in the expression of its Views.[7] It is up to the Committee to determine whether a case should be registered. By failing to accept the competence of the Committee to determine whether a communication should be registered and by declaring outright that it will not accept the Committee's determination of the admissibility and the merits of a communication, the State party has violated its obligations under article 1 of the Optional Protocol to the Covenant.

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not 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 contention of the State party that the author should have requested the Prosecutor General's Office to initiate a supervisory review of the decision of the Supreme Court. It also takes note of the author's explanation that such a remedy was neither effective nor accessible. It also notes that the author's request of 23 April 2012 for a supervisory review was rejected by the Prosecutor General's Office on 5 March 2013. In the circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

8.4 The Committee takes note of the author's claim that the State party violated his rights under article 22, paragraph 2, read in conjunction with article 2, paragraph 2, of the Covenant. The Committee considers, however, that based on the material before it, the author has not shown sufficient grounds to support his claim regarding a violation of article 2, paragraph 2, of the Covenant. The Committee therefore considers that the author has not sufficiently substantiated his claim for the purposes of admissibility and concludes that it is inadmissible under article 2 of the Optional Protocol.

[7] See, e.g. communication Nos. 1867/2009, 1936/2010, 1975/2010, 1977/2010, 1978/2010, 1979/2010, 1980/2010, 1981/2010 and 2010/2010, *Pavel Levinov* v. *Belarus*, Views adopted on 19 July 2012, para. 8.2; and communication No. 869/1999, *Piandiong et al.* v. *The Philippines*, Views adopted on 19 October 2000, para. 5.1.

8.5 The Committee considers that the author has sufficiently substantiated his claim under article 22, paragraph 1, of the Covenant, for the 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 light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

9.2. The issue before the Committee is whether the refusal of the State party authorities to register the author's human rights association, "For Fair Elections", constitutes an unjustified restriction of the right to freedom of association of the author and the other alleged victims. In that connection, the Committee recalls that its task under the Optional Protocol is not to assess in the abstract laws enacted by States parties, but to ascertain whether the implementation of such laws in the case in question gives rise to a violation of the rights of the author and the alleged victims.[8] The Committee recalls that, in accordance with article 22, paragraph 2, of the Covenant, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be provided for by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be "necessary in a democratic society" for achieving one of those purposes.[9] The reference to a "democratic society" in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the Government or the majority of the population, is a cornerstone of any society.[10]

9.3 In the present case, the registration of the association was denied on the basis of a number of stated reasons. Those reasons must be assessed in the light of the consequences which arise for the author and the alleged victims, as well as their association. The Committee notes that, even though such reasons were prescribed by the relevant law, as it follows from the material before it, the State party has not attempted to advance any argument as to why they are necessary in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. 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 decisions of the domestic authorities made available to it, that no explanation was provided by the domestic authorities, particularly the Supreme Court, as to the necessity to restrict the right to freedom of association of the author and the alleged victims, in line with article 22, paragraph 2, of the Covenant.

9.4 The Committee also notes that the denial of registration led directly to the operation of the association on the territory of the State party being unlawful and directly precluded the author and the alleged victims from enjoying their freedom of association. Accordingly, the Committee concludes that the denial of registration does not meet the requirements of article 22, paragraph 2, in relation to the author and the alleged victims. The rights of the

[8] See communication No. 550/1993, *Faurisson* v. *France*, Views adopted on 8 November 1996, para. 9.3.

[9] See, for example, communication No. 1039/2001, *Zvozskov et al.* v. *Belarus*, Views adopted on 17 October 2006, para. 7.2; communication No. 1383/2005, *Katsora, Sudalenko and Nemkovich* v. *Belarus*, Views adopted on 25 October 2010, para. 8.2.

[10] See *Katsora, Sudalenko and Nemkovich* v. *Belarus*, para. 8.2.

author and of the alleged victims under article 22, paragraph 1, of the Covenant have thus been violated.

9.5 In the light of the above, the Committee concludes that the rights of the author and of the alleged victims under article 22, paragraph 1, 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 rights of the author and the alleged victims under article 22, paragraph 1, 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 rights of the the author and the alleged victims under article 22, paragraph 1, 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 and the alleged victims with an effective remedy, including reconsideration of the application for registration of the association, "For Fair Elections", based on criteria compliant with the requirements of article 22 of the Covenant. The State party is also under an obligation to take steps to prevent similar violations in the future.

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 there has been a violation of the Covenant or not 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.