



**International
covenant
on civil and
political rights**

Distr.
RESTRICTED*

CCPR/C/81/D/712/1996
18 August 2004

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-first session
5 - 30 July 2004

VIEWS

Communication No. 712/1996

<u>Submitted by:</u>	Yelena Pavlovna Smirnova (represented by counsel, Mrs. Karina Moskalenko)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Russian Federation
<u>Date of initial communication:</u>	19 June 1996 (initial submission)
<u>Documentation references:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 8 August 1996 (not issued in document form) CCPR/C/62/D/712/1996, decision on admissibility adopted on 2 April 1998
<u>Date of adoption of Views:</u>	5 July 2004

On 5 July 2004 the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4 of the Optional Protocol, in respect of communication No. 712/1996. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

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**

Eighty-first session

concerning

Communication No. 712/1996**

Submitted by: Yelena Pavlovna Smirnova (represented by
counsel, Mrs. Karina Moskalenko)

Alleged victim: The author

State party: Russian Federation

Date of initial communication: 19 June 1996 (initial submission)

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

Meeting on 5 July 2004

Having concluded its consideration of communication No. 712/1996 submitted to the
Committee on behalf of Yelena Pavlovna Smirnova 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 Yelena Pavlovna Smirnova, a Russian citizen, born in
1967.¹ She claims to be a victim of a violation by the Russian Federation of articles 9 and 14
of the Covenant. She is represented by counsel.

** The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr.
Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik
Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin
Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

¹ The Optional Protocol entered into force in relation to the Russian Federation on 1 January
1992.

The facts as presented by the author

2.1 On 5 February 1993, criminal proceedings were initiated against the author under article 93(a) of the Russian Criminal Code, in relation to allegations that she had defrauded a Moscow bank by seeking to obtain credit on security of an apartment that did not belong to her. The author did not learn of the criminal proceedings against her until 14 September 1994, when she was arrested by officers of the Moscow police. She was released after 36 hours.

2.2 On 26 August 1995, the author was again arrested and detained in the pre-trial detention centre of Moscow's Butyrskaya prison. She was not officially advised of any charges against her until 31 August 1995, and was not promptly provided with the assistance of legal counsel. It appears from the enclosures that despite several requests, counsel was not allowed to see the author until 2 November 1995.

2.3 According to the author, her arrest and detention were unlawful because she was taken into custody after the expiration of the designated period for the completion of a preliminary investigation. She explains that under Russian criminal procedure, a suspect can be arrested only pursuant to an official investigation. In the author's case the investigation began on 5 February 1993 and expired on 5 April 1993, pursuant to article 133(1) of the Code of Criminal Procedure. Article 133 (4) of the code allows for a one month extension of suspended and resumed investigations. Pursuant to this article, the preliminary investigation in the author's case was extended six times, three of which illegally, as acknowledged by the Municipal Prosecutor.

2.4 On 27 August 1995, the author submitted a complaint to the police investigator contesting the legality of her arrest and detention pursuant to article 220(1) of the Code of Criminal Procedure. The investigator did not refer the complaint to the Tver inter-municipal Court until 1 September 1995, in violation of the requirement that such complaints be submitted to a court within one day. The author states that the Court dismissed the complaint on 13 September 1995 without having heard any argument from the parties, on the ground that it was not competent to review the legality of the arrest and detention since the investigation in the case had been completed. Yet this was the basis of the author's claim that her arrest had been unlawful. The author submits that the Court should have heard her case, because in reality the investigation had been extended and was ongoing, albeit, as the author contends, unlawfully. The author was unable to appeal against the decision of the Court, as article 331 of the Code of Criminal Procedure did not allow for an appeal against a decision in relation to a claim brought under article 220.

2.5 The author states that, as of the date of her first communication, no trial date had been set and that the Court had announced that her case would not be scheduled until September 1996. According to the author, this constituted a violation of article 223 of the Code of Criminal Procedure, which guarantees the designation of a trial date within 14 days of the commencement of an action in Court.

2.6 The author further submits that she suffers from a serious skin disease, haemorrhoidal vasculitis and that the conditions of the prison in which she was detained aggravated her medical condition. In this context, she states that there was no adequate food or medication in the prison, that the cells, designed for 24 persons, held 60, and that she was detained together with serious criminals. The author submits that, given she did not have any previous criminal

record, and had not been charged with a serious or violent offence, she should not have been remanded in custody. With regard to the prison conditions in the Butyrskaya prison, reference is made to the report of the Special Rapporteur on Torture of the Commission on Human Rights, dated 16 November 1994.² In March 1996, the author was transferred to a hospital ward, where she stayed until 17 May 1996, before being transferred back to her cell.

2.7 As to the exhaustion of domestic remedies, the author contends that the Code of Criminal Procedure did not allow appeals from decisions under article 220. In the absence of the possibility of judicial review, the author complained about the unlawfulness of the judge's decision to a number of bodies, including the Moscow Municipal Prosecutor, the Moscow District Prosecutor, the General Prosecutor of the Russian Federation, the Moscow Municipal Department of Justice, the Moscow Municipal Court, and the Moscow Collegium of Judicial Qualification. These bodies confirmed that the judge's decision was not subject to review. Moreover, the Ministry of Justice acknowledged that the judge's decision was erroneous, but that it was unable to take any action in the absence of proof of criminal misconduct by the judge. The Municipal Prosecutor acknowledged bureaucratic delays in the investigation of the author's case, but nevertheless did not allow her to be released. No further remedies were said to exist.

The complaint

3. The author contends that her pre-trial detention contravened articles 9, 10 and 14 (3) of the Covenant, as she was deprived of her liberty in contravention of Russian law on criminal procedure, she was not informed promptly of the grounds of her arrest or of any of the charges against her, she was not brought promptly before a judge or judicial officer, and was detained awaiting trial despite the fact that she had no criminal record. She also alleges that the crime she was charged with was not a serious offence, and that there was no reason to believe that she would not appear for investigation or trial. Further, she claims that she was denied the right to take proceedings before the court for a decision on the lawfulness of her arrest. She also invokes the rights contained in articles 7 and 10 of the Covenant in respect of the conditions of detention and lack of medical treatment.

The state party's observations on admissibility and merits

4. By noted dated 4 April 1997, the State party submitted an 'interim reply' to the communication. It contended that criminal proceedings against the author had been instituted on charges of large scale fraudulent misappropriation of money. It explained that, in view of the serious nature of the charges, she was arrested and taken into custody, and that the investigations had now been completed. The State party advised that criminal proceedings had been instituted against the author on 8 April 1996 in the Tver inter-municipal Court, and that they remained on foot. As the proceedings had not yet concluded, it submitted that the communication was inadmissible on the basis that domestic remedies had not been exhausted.

Comments of the author on the State party's observations

5. In her comments on the State party's observations dated 24 April 1997, the author contended that the State party had not addressed her claims about the unlawfulness of her

² E/CN.4/1995/34/Add.1, paragraphs 70 and 71.

arrest, and denial of access to a Court to review the lawfulness of her detention, in violation of articles 9 and 14, paragraph 3, of the Covenant. She acknowledged that the trial against her had commenced on 8 April 1996, but stated that it had gone on for over a year without granting due process, and that the court intended to send the case back for further investigation. The author submitted that the State party's response dealt with the underlying criminal case against her, which was not the subject of her communication to the Committee. She reiterated that domestic remedies had been exhausted in relation to claims of unlawful arrest and denial of access to a Court to challenge the lawfulness of her detention. She further argued that the Courts had continued to refuse her requests to examine the question of whether her arrest was lawful, and that it was not possible to appeal the original decision of the Tver inter-municipal Court.

Decision on admissibility

6. At its sixty-second session, the Committee determined that the communication was admissible, noting that the State party had not addressed the admissibility of the author's claim concerning the circumstances of her detention, and that the author's claims did not relate to her current trial, but to her arrest and detention, which, according to her, were unlawful and with respect to which domestic remedies had been exhausted. The Committee noted that the communication may raise issues under articles 7, 9, 10 and 14(3) which should be examined on their merits. It invited the State party to submit written explanations or statements clarifying the matters raised in the communication. The decision was transmitted to the State party on 27 April 1998.

Further communication from the author and observations from the State party

7.1 On 17 August 1998, the author submitted a further communication, requesting that the Committee examine additional alleged violations by the State party of her Covenant rights. The communication did not address the matters raised in the original communication, but rather events which had occurred subsequently. The author stated that on 21 March 1997, the Tver inter-municipal Court had ordered that she continue to be held in custody pending a further investigation into the charges against her. She submitted that a decision of the Constitutional Court on 2 July 1998 had found article 331 of the Criminal Code invalid, the implication of which was that she had the right to appeal the former Court's decision to conduct a further investigation into her case; however, despite this, based on a very narrow reading of the Constitutional Court's decision, the Tver inter-municipal Court had refused to refer the author's matter to appeal. It transpires from the file that the author was released from prison on 9 December 1997, although the circumstances are not explained.

7.2 By note dated 29 March 1999, the State Party contended that on 5 February 1993, a criminal investigation had been commenced into the author's suspected involvement in large scale fraud, and that, under Russian law, this was considered a serious offence. It stated that, because the author had evaded the investigating authorities, a warrant had been issued for her arrest, that the investigation was suspended during the search, and reinstated after her eventual arrest. The State party argued that the investigation was extended in accordance with the article 133(3) of the Code of Criminal Procedure, and that the process of extending the period of investigation involved no violations of Russian law. It noted that criminal procedure laws made no provision for a person in police custody to be brought before a judge or other judicial officer. The State party submitted that during the arrest the author had been informed

of the reasons for her arrest in 1995 and the charges against her, and the reasons for the decision to place her in preventive detention. This process was reviewed, following a complaint by the author to the Prosecutor's office, and no violations of domestic law were found to have occurred. The State party notes that in December 1997 the author was released from preventive detention and in lieu thereof an order was issued for her to remain at her permanent address. It further noted that proceedings before the Tver inter-municipal court remained underway, and that a decision was still pending owing to the author's failure to appear before the Court.

7.3 In her comments on the State party's observations, undated, counsel reiterated that the author's detention in 1995 had taken place after the legal expiry of the investigation period, and that the Courts had refused to consider her petition about the lawfulness of her arrest. Details are then provided about the continuing passage of her case through the State party's court system, claiming further violations of the Covenant by the State party over the period from December 1997 until May 1999, in relation to the length of the ongoing trial process, and her arrest and detention for a second time by the Russian authorities on 30 March 1999 (it transpired that she was released on 4 October 1999). She also claims that her illness, should have qualified her for release from detention on medical grounds.

7.4 On 16 March 2000, the author submitted information to the Committee about her third arrest by the authorities on 10 November 1999, alleging further violations of the Covenant by the State party in relation to the continuing and protracted Court proceedings against her, and the decision of the Court to remand her in custody. It transpires from the file that she was released on 25 April 2000.

7.5 By note dated 23 November 2000, the State party reiterated that the author tried to evade the initial inquiry and the charge was presented to her in absentia on 5 April 1993. While she was being sought, the investigation was suspended in accordance with relevant provisions of the code of criminal procedure. The State party submitted that the author had been interrogated as an accused on 9 March 1995. At that time she was handed a decision on charges against her and appended a hand written note stating that she was familiar with the text of the decision and that she is contesting the charge. The State party argues that the arrest of the author on 26 August 1995 had been appropriate in view of the seriousness of the fraud charges against her and the fact that she had evaded the initial inquiry into the alleged fraud. The State party claims that on 27 August 1995, the author was advised of her right to appeal to the courts against her detention, and that the author did have access to a court to challenge the lawfulness of her detention – her complaint dated 27 August 1995 reached the Tver inter-municipal court in Moscow on 1 September 1995, but the judge declined to entertain it. A second petition regarding her detention was heard by the Lyubinsky inter-municipal court on 9 December 1997, and by order of a Federal judge the preventive measure against the author was changed from detention to an order not to leave the area. The State party also contends that, whilst the author was in detention, she was given the necessary medical care. It stated that her illness could constitute a ground for releasing a prisoner, but only where it was in an advanced state. The State party noted that it could not verify whether in August 1995 the author was held in a cell with convicted criminals – the relevant documentation had been destroyed in accordance with the usual deadlines. It also noted that the author had now been detained for a fourth time, on 28 August 2000, following her failure to appear in Court.

7.6 On 22 May 2002, the author submitted a further communication, insisting that the State party had not explained why she was not provided with genuine access to a court on 13 September 1995, namely why the Court had failed to entertain her petition, and affirming that the physical conditions of her detention were inhuman. The author advised that on 9 April 2002 the proceedings against her had finally been closed.

Author's proceedings before the European Court of Human Rights

8.1 Although the matter was not raised in the submissions of the author or the State party, the Committee is aware that, on 9 November 1998, after its decision on the admissibility of her communication on 2 April 1998, the author submitted a complaint to the European Court of Human Rights (European Court), which was registered as case no 46133/99. The European Court considered the admissibility of the author's complaint on 3 October 2002. In its decision, the European Court examined, for the purposes of its own admissibility requirements, the fact that the author had submitted a communication to the Committee. The European Court noted the author's arguments in defense of the admissibility of her complaint before the Court, stating:

'(The complainant) asserts that her application to Geneva in 1995 (sic)³ concerned only the events that predated the application, namely the impossibility to obtain a judicial review of her arrest on 26 August 1995 and therefore could not touch upon the facts which happened afterwards and were submitted to the Court in November 1998.⁴ (emphasis added)

8.2 The Court noted that the author's communication to the Human Rights Committee was:

'directed against her arrest on 26 August 1995, and, in particular, the question whether this arrest was justified, the impossibility to challenge it in the courts, and the alleged inadequate conditions of detention. The scope of the factual basis for (her) application to the Court, although going back to the arrest of 26 August 1995, is significantly wider. It extends to the whole of the proceedings which terminated in 2002, and includes (her) arrest on three more occasions since 26 August 1995. It follows that (her) application is not substantially the same as the petition pending before the Human Rights Committee ...'⁵

8.3 The Committee is also aware that, by its decision dated 24 July 2003, the European Court found violations of articles 5, 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and ordered the State party to pay to the author compensation in the amount of 6,500 Euros.

Issues and proceedings before the Committee

9.1 The Committee's decision on the admissibility of the author's communication necessarily related only to matters presented to the Committee in the initial complaint. It transpires that, following this decision, the author has submitted information about events which occurred subsequently (after 2 April 1996), and accordingly, before considering these further claims,

³ The application was made on 19 June 1996.

⁴ Page 10 of the decision.

⁵ Page 11 of the decision.

the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not they are admissible under the Optional Protocol to the Covenant.

9.2 There are several considerations bearing on the admissibility of these additional communications. First, the fact that the author has submitted a complaint to the European Court requires the Committee to consider the issue of article 5, paragraph (2)(a) of the Protocol, namely whether ‘the same matter’ is ‘being examined under another procedure of international investigation or settlement’. Insofar as the matters raised in the authors’ communications to the Committee relate to circumstances occurring after the date of her initial communication to the Committee, these matters appear to the Committee to be the ‘same’ as matter which were before the European Court. So much appears from the judgment of the European Court, which described the factual circumstances submitted to it by the author in some detail. According to the Court, these cover the author’s arrest and detention by the authorities of the State party on four separate occasions. The author’s claim before the European Court invoked article 5 of the European Convention (the right to liberty and security of the person) and article 6 (determination of criminal charges within a reasonable time).⁶ However, the author’s case before the European Court has now been determined, and therefore the same matter is not currently ‘being examined’ under another international procedure. The Committee notes that, at the time the author submitted her additional communications dated 17 August 1998, 16 March 2000, 22 May 2002, and her undated communication of 1999, the same matter *was* before the European Court. Nevertheless, the wording of article 5(2)(a) of the Protocol requires the Committee to consider whether, *at the time it considers the question of admissibility*, the matter is under another international procedure.⁷ The declaration issued by the State party in relation to the Optional Protocol does not, unlike the reservations of some States parties, preclude the Committee from considering communications where the same matter *has been* the subject of another international procedure.⁸ Accordingly, the Committee considers that article 5, paragraph 2(a) poses no obstacle to admissibility in the present circumstances.

9.3 The fact that the European Court has considered the author’s case remains relevant to the question of admissibility in other respects. In accordance with article 1 of the Protocol, the Committee can only consider communications from individuals who claim to be victims of a violation by a State party of rights contained in the Covenant. The Committee has previously recognized that a person’s status as a victim for the purposes of the Protocol can change over time, and that post admissibility developments can remedy a violation.⁹ In this instance, it transpires that the author is not currently in detention, and it would appear that the principal form of redress which could be provided by the State party to remedy any relevant violations of her rights would be an award of compensation. The European Court has ordered payment of compensation in relation to matters arising after 19 June 1998 (the date of the author’s first communication to the Committee). Under article 41 of the European Convention, such

⁶ It also invoked article 8 (freedom from interference in private life).

⁷ Communication No 349/1988 (*Wright v Jamaica*).

⁸ The declaration reads, relevantly: ‘The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies.’

⁹ Communication 50/1979 (*Van Duzen v Canada*).

compensation is directed at affording ‘just satisfaction to the injured party’. These circumstances lead the Committee to the view that the author can no longer be considered a ‘victim’, for the purposes of article 1 of the Protocol, of violations of the Covenant said to have arisen after 19 June 1998.

9.4 Accordingly, the Committee considers that, to the extent that the author’s communications relates to events occurring after 19 June 1998, they are inadmissible under article 1 of the Protocol. It now proceeds to consider the merits of the remainder of the author’s communication.

Consideration of the merits

10.1 With regard to the author’s claim that she was denied access to a Court to challenge the lawfulness of her detention on 27 August 1995, the Committee notes that the State party, in its observations dated 23 November 2000, refers only to the fact that the author’s complaint about the lawfulness of her detention dated 27 August 1995 reached the Tver inter-municipal court in Moscow on 1 September 1995 (although it was not considered until 13 September), and that the judge declined to entertain it. It transpires from the submissions that the trial judge did not entertain the complaint on the basis that the investigation had been completed, and that therefore the Court was not competent to hear the author’s petition. The right of a person deprived of her liberty to take proceedings before a court to challenge the lawfulness of her detention is a substantive right, and entails more than the right to file a petition – it contemplates a right for a proper review by a court of the lawfulness of the detention. Accordingly, the Committee finds a violation by the State party of article 9(4). Similarly, given that the decision of the judge not to entertain the author’s petition on 13 September was made *ex parte*, the Committee is of the view that the author was not brought promptly before a judge, in violation of article 9(3). In this regard, the Committee notes with concern the State party’s submission of 29 March 1999 that its criminal procedure laws, at least at that time, made no provision for a person in police custody to be brought before a judge or other judicial officer.

10.2 The author’s submission that she should not have been detained pending trial invokes article 9(3), which states that it shall not be the general rule that persons awaiting trial shall be detained in custody. However, in light of its finding of a violation of article 9(3) above, the Committee considers it unnecessary to consider these allegations.

10.3 With regard to the author’s claim that she was not informed promptly of the charges against her, the Committee does not consider there to have been a violation by the State party of articles 9(2) or 14(3) of the Covenant. Upon her arrest on 26 August 1995, it appears that she was not formally advised of the charges against her until 31 August 1995. However, it appears that she had been previously advised of the charges against her when she was interrogated in September 1994. The State party contends that the author was advised of the reasons for her arrest and why she was being placed in preventive detention. In these circumstances, the Committee considers that it is not in a position to establish any violation of the State party’s obligations under article 9(2) and 14(3) (a) of the Covenant.

10.4 In relation to the author’s claim that she was not tried without undue delay, the Committee notes that it has to limit its examination to the period between the initiation of criminal proceedings against the author in February 1993 and the date of her communication to the Committee on 19 June 1996 (see paragraph 9.3 above). This period exceeds three

years. However, the author has not contested the submission of the State party that she had evaded the authorities for much of this time. In these circumstances, the Committee considers that there has not been a violation of article 14(3)(c) of the Covenant.

10.5 The author's original communication raised issues under article 7, 10, paragraph 1 of the Covenant as so far as she claims that the physical circumstances of her detention amounted to cruel, inhuman or degrading treatment or punishment. The author has provided a detailed account of the circumstances of her detention. In response, the State party submitted that the author was provided with medical assistance during her detention. It did not provide details of the physical conditions in which the author was detained. Accordingly, the Committee cannot do otherwise than afford due weight to the author's claims. The Committee, in accordance with its jurisprudence, considers that the burden of proof cannot rest solely with the author of the communication, considering that the author and that State party do not always have equal access to the evidence. In the circumstances, the Committee is of the view that the conditions of the author's detention as described in her complaint were incompatible with the State party's obligations under article 10, paragraph 1 of the Convention. In light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the State party violated articles 9, paragraph 3 and 4, and article 10(1) of the Covenant.

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the author is entitled to an effective remedy, including appropriate compensation for the violations suffered. The State party is also under an obligation to take effective measures to ensure that similar violations do not recur.

13. By becoming a State 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 all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in cases where a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's views. The State party is also requested to publish the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
