



**International Covenant on
Civil and Political Rights**

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Ninety-eighth session
8 to 26 March 2010

Views

Communication No. 1589/2007

Submitted by: Ms. Sanobar Gapirjanova (not represented by counsel)

Alleged victim: Mr. Youzef Gapirjanov, the author's son

State party: Uzbekistan

Date of communication: 15 November 2006 (initial submission)

Document references:

- Special Rapporteur's rule 97 decision, transmitted to the State party on 22 August 2007 (not issued in document form);
- CCPR/C/94/D/1589/2007 - decision on admissibility adopted on 10 October 2008.

Date of adoption of Views: 18 March 2010

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Unfair trial with resort to torture during preliminary investigation.
<i>Substantive issues:</i>	Torture, habeas corpus, unfair trial.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claim, evaluation of facts and evidence.
<i>Articles of the Covenant:</i>	7, 9, 10, 14
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (b); 2

On 18 March 2010, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1589/2007.

[Annex]

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 (Ninety-eighth session)

concerning

Communication No. 1589/2007**

Submitted by: Ms. Sanobar Gapirjanova (not represented by counsel)

Alleged victims: Mr. Youzef Gapirjanov, the author's son

State party: Uzbekistan

Date of the communication: 15 November 2006 (initial submission)

Date of Admissibility decision: 10 October 2008

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

Meeting on 18 March 2010,

Having concluded its consideration of communication No. 1589/2007, submitted to the Human Rights Committee on behalf of Mr. Youzef Gapirjanov 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 authors 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 Ms. Sanobar Gapirjanova, an Uzbek national born in 1935. She submits the communication on behalf of her son, Mr. Youzef Gapirjanov, also an Uzbek national, born in 1963, currently serving a 10-year prison sentence handed down by the District Court of Hamza (Tashkent) on 10 February 2005 for drug trafficking. The author claims that her son is a victim of violations by Uzbekistan of his rights under article 7; article 9; article 10; 12; and article 14, paragraphs 1 and 3 (b), (d), and (e), of the International Covenant on Civil and Political Rights. The author is not represented by counsel.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmed Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

The facts as submitted by the author

2.1 On 10 February 2005, the District Court of Hamza (Tashkent) handed down a 10-year prison sentence, convicting the author's son for illicit traffic in drugs. The author's son was also recognized as a dangerous recidivist. On 19 April 2005, the case was heard on appeal by the Tashkent City Court and the sentence was upheld. Several petitions for supervisory judicial review (*nadzornaya zhaloba*) submitted on behalf of the author's son were subsequently dismissed by the Supreme Court of Uzbekistan.¹

2.2 The author claims that when her son was arrested on 11 August 2004, he was beaten by police officers to force him to plead guilty. As a result he suffered damage to his left ear and had to be taken to hospital for care. The author contends that her son informed a prosecutor of this on an unspecified date, but that the prosecutor ignored his complaint. His file contained a medical certificate dated 13 August 2004 from a doctor in the traumatology service of Hospital No. 1 in Tashkent, stating that the son's injury was indeed the result of "mechanical damage". According to the author, the investigators later removed this certificate from the file.²

2.3 The author asserts that, in the light of her son's repeated complaints about the use of illegal investigation methods, the court should have ordered a new medical examination and verify the specific cause of his injury. However, the court did not order any additional examinations and declared itself satisfied with the testimony of a medical expert, according to whom Mr. Gapirjanov suffered from chronic otitis, but the examination had been conducted too late to determine whether he had been struck on the ear. It is also claimed that the court accepted statements from police officers, which affirmed that the investigation had been carried out according to the rules and without having to resort to force³.

2.4 According to the author, her son's trial was unfair and his sentence unfounded. Her son had been accused of having sold heroin on various occasions to three different individuals. The criminal responsibility of those three individuals had also been engaged in the context of the same case; they therefore had a personal interest in the matter and were all drug addicts. Those individuals, according to the author, had incriminated her son in order to limit their liability. The author's son had not been caught *in flagrante delictu*;

¹ With regard to the petitions for supervisory review, the author has submitted copies of various petitions presented on behalf of her son. Such petitions were addressed to the President of the Supreme Court on 20 July and 12 September 2005. One petition was addressed to the Presidium of the Supreme Court on an unspecified date. On 11 November 2005, the First Deputy President of the Supreme Court dismissed the petitions. Another petition for judicial review was addressed to the President of the Supreme Court on 15 December 2006. On 1 February 2007, the President of the Supreme Court's Criminal Division informed the author that he had examined the case and had found no justification for requesting a review.

² The author provides a copy of a response from the senior medical officer of her son's place of residence, dated 26 January 2005, certifying that Mr. Gapirjanov had not suffered from any ear disorder in the past.

³ In support of her allegations on her son's ill-treatment, the author contends that he was initially placed in custody at the UYa-64/IZ-1 detention centre in Tashkent. When it became clear that the detention centre would receive a visit from representatives of the International Committee of the Red Cross, the officials transferred him to another detention centre in Tashkent (in the Kibrai district), according to the author in order to prevent him from revealing that he had been beaten by the police. A fictitious document is alleged to have been drawn up for that purpose by the head of the Kibrai detention centre, stating that Mr. Gapirjanov had been arrested for drug possession on 28 October 2004 in the Kibrai district. The author notes that her son was already in custody on that date, and the alleged arrest was therefore impossible.

therefore, the accusation against him was based solely on false statements that those three individuals produced to avoid being held responsible. No other objective evidence of the son's guilt was produced neither during the preliminary investigation or in court.⁴

2.5 The right to defence of the author's son allegedly was violated because he was not represented by counsel after his arrest, in spite of his repeated requests. Investigation procedures involving the author's son were thus conducted in the absence of a lawyer. Several of the requests or petitions submitted by the author's son during the preliminary investigation or during the trial were not examined, which allegedly made it impossible to establish the objective truth.⁵ Neither the investigators nor the courts questioned a certain Mr. Turdikhodjaev, who could have confirmed the son's alibi. In addition, her son did not attend the appeal hearing, despite his specific request to this effect.⁶

2.6 The author contends that her son's lawyers acted in a passive way. Thus, the lawyers failed to request certification of the level of drug dependency of the three other persons accused together with her son. They failed to submit to the court an expert evaluation of the damage to her son's left ear, and did not request a new examination of his injury.

2.7 According to the author, in violation of article 243 of the Uzbek Code of Criminal Procedure, her son was not questioned by a prosecutor in connection with his placement in custody; yet a record of an interrogation between her son and a prosecutor was prepared in advance by the investigator.

2.8 On 12 August 2004, police officers allegedly cut the pockets out of her son's trousers, before sealing them and sending them off for analysis. The author claims that no witnesses were present during this procedure, thus rendering it illegal. This was also disregarded by the court.

2.9 The investigators are said to have conducted a search of Mr. Gapirjanov's apartment and to have found 0.11 grams of heroin there. The author claims that, according to her son, the drugs in question had been planted and were hidden in the apartment by the police officers themselves. When the drugs were found, the officers made all the witnesses leave the room. This, the author argues, explains why the investigator then refused to order an analysis to compare the drugs seized in her son's apartment with those seized at the apartment of one of the co-accused.

2.10 The author claims that, during the preliminary investigation, one of the police officers demanded one thousand US dollars in exchange of a promise to close the case, an offer which her son refused.

2.11 The author finally contests the findings of a complementary expert examination of the seized heroin (conducted on 30 August 2004), arguing that such an examination could not have taken place since the drugs seized should already have been used in their entirety during the analyses conducted on 12 and 13 August 2004.

⁴ According to the author, her son was taken out of the courtroom and deprived of his right to make a closing statement at the end of the proceedings, but there is nothing in the case file to support this allegation.

⁵ The author further contends that during the preliminary investigation and the trial proceedings, she and her son submitted 114 petitions to various institutions, but received only 16 official replies.

⁶ The court allegedly rejected his request on the grounds that it had only been made on the day of the appeal hearing. According to documents presented by the author, on 5 April 2005, the court of appeal informed the author's son and his lawyer that the appeal would be heard on 19 April 2005, but before the hearing the court did not receive any request for it to question her son during the hearing.

The complaint

3.1 The author claims that her son is a victim of a violation of his rights under articles 7 and 10, as he was beaten by police officers during his arrest. The prosecutor ignored her son's complaints in this regard, and the court did not order his medical examination to verify his contention.

3.2 The author claims that her son is a victim of violations of article 9, as, after his arrest, he was not brought before a judge or other officer authorised by law to exercise judicial power.

3.3 The author claims, without offering further information, that her son is a victim of violation of his rights under article 12, of the Covenant.

3.4 Ms. Gapiirjanova contends that her son's trial did not meet the requirements of fairness within the meaning of article 14, paragraph 1, of the Covenant, and his sentence was unfounded.

3.5 The author argues that her son's rights under article 14, paragraphs 3 (b) and (d) were violated, as he was unrepresented after his arrest in spite of his request to this effect, and that he was not allowed to attend the appeal hearing of his case.

3.6 The author finally claims that her son's rights under article 14, paragraph 3 (e), were violated, as different requests made on his behalf during the investigation and in court were ignored, and, in particular, neither the investigators nor the court had interrogated a witness who could have confirmed the author's son alibi defence.

State party's observations on admissibility

4.1 On 15 October 2007, the State party recalled that on 10 February 2005, the Hamza District Court had found Mr. Gapiirjanov guilty of a violation of article 275 of the Uzbek Criminal Code (illegal production, purchase or possession of narcotic or psychotropic substances and other related activities, with a view to their sale) and sentenced him to a 10-year prison term, as a dangerous repeat offender. The judgement was upheld on appeal by the Tashkent City Court on 19 April 2005. The State party noted that Mr. Gapiirjanov had not exhausted all available domestic remedies, as his case had not been examined by the Supreme Court of Uzbekistan under the supervisory review procedure. The State party thus requests the Committee to declare the communication inadmissible.

4.2 The State party asserts, without submitting details, that none of the author's allegations related to the conduct of the investigation or the trial are founded.

Decision on admissibility

5.1 During its ninety-fourth session, on 10 October 2008, the Committee considered the admissibility of the communication. It noted the State party's challenge to admissibility on the grounds that the case had not been examined by the Supreme Court of Uzbekistan under the supervisory review procedure. The Committee observed that the State party provided no explanation as to the effectiveness of these proceedings but limited itself to noting that they were provided for by law. The Committee considered that even if such remedies may be *effective* in certain situations, such reviews were possible only with the express consent of the President or Vice-Presidents of the Supreme Court, who therefore have discretionary power to refer or not to refer a case to the Court, whereas a convicted person claiming that his or her rights have been violated could not initiate such a review directly.

5.2 The Committee noted that, in the present case, the author provided copies of several letters rejecting her requests for a judicial supervisory review in her son's case. These rejections were signed by the President or the Vice-Presidents of the Supreme Court; thus,

the fact that the case of the author's son had not been examined by the Criminal Division, the Plenum or the Presidium of the Supreme Court could in no way be attributed to the author. The Committee also noted that the State party's Courts Act indicated that, apart from reviews conducted by the Chambers of the Supreme Court, the Presidium or the Plenum of the Supreme Court *may* also examine such cases. In the Committee's view, this showed that the remedies concerned are not generally applicable but remain discretionary and exceptional. Accordingly, the Committee considered that it was not barred from examining the present communication by article 5, paragraph 2 (b), of the Optional Protocol.

5.3 The Committee further noted the author's claim that her son's rights under article 12 of the Covenant have been violated, without providing any information in support of the claim. In the absence of any other pertinent information, it considered that the author's contentions in this regard were inadmissible under article 2 of the Optional Protocol.

5.4 The Committee considered that the author's allegations raising issues under article 7; article 9; article 10; and article 14, paragraphs 1 and 3 (b), (d), and (e), of the Covenant were sufficiently substantiated for purposes of admissibility, and that the authors' claims in respect of these provisions should be examined by the Committee on their merits.

State party's observations on the merits

6.1 The State party presented its observations on the merits by Note Verbale of 6 March 2009. It recalls the facts of the case: on 10 February 2005, the Khamzinsk district Court of Tashkent has found Mr. Gapirjanov guilty of illicit selling of narcotic substances in an important amount, and sentenced him to ten years of prison term. This decision was confirmed on appeal, on 19 April 2005, by the Tashkent City Court. Mr. Gapirjanov was also found to be a particularly dangerous recidivist.

6.2 The State party points out that, given that the Tashkent City Court initially examined Mr. Gapirjanov's appeal in the victim's absence, the Presidium of the Tashkent City Court annulled, on 30 January 2008, the appeal decision of 19 April 2005. Following a new appeal examination, on 11 March 2008, the Tashkent City Court confirmed Mr. Gapirjanov's sentence of 10 February 2005.

6.3 The State party contends that the author's allegations in the present communication are groundless. Mr. Gapirjanov was arrested on 11 August 2004. After his arrest, police officers seized his trousers' pockets, in the presence of official witnesses. This investigation act was duly recorded and signed by those present. A chemical-forensic examination of 30 August 2004 established that the seized pockets disclosed traces of heroin.

6.4 The State party contends that in light of the urgency, the search in Mr. Gapirjanov's home on 13 August 2004 was carried out without prior agreement of a prosecutor. However, the prosecutor was duly informed, in accordance with the law in force (article 161 of the Criminal Procedure Code), about the search in question. The official witnesses present did not report any irregularities and confirmed the content of the official records made in respect of the outcome of the search. During the search, police officers discovered a small package that later appeared to contain 0.11 grams of heroin.

6.5 According to the State party, from the moment of arrest, Mr. Gapirjanov's Constitutional rights were fully respected, he was assigned an ex-officio lawyer, and his relatives were informed about his arrest.

6.6 On 12 August 2004, Mr. Gapirjanov was interrogated as a suspect in the presence of a lawyer, Mr. Sadirislomov. Mr. Gapirjanov had not complained about unlawful acts by the investigators. Throughout the preliminary investigation, Mr. Gapirjanov had requested on a

number of occasions to have his lawyers replaced. For this reason, his lawyers had changed several times. In any event, his procedural rights were always protected, as required by law.

6.7 The State party recalls that according to a conclusion of a forensic-medical examination of 7 October 2004, Mr. Gapiirjanov had sought medical help about his left ear on 13 August 2004. On this occasion, it was found out that he suffered from chronic otitis, what was not due to any coercive acts. His body did not disclose any injuries at that time. When interrogated in court on the matter, an expert of the Medical-Forensic Office explained that Mr. Gapiirjanov had complained about his ear on 13 August 2004 and his otitis was then discovered. According to the expert, the incubation period before the manifestation of such diseases was around one month, i.e. the alleged victim's disease had started prior to the victim's arrest.

6.8 As to the author's allegations that a police officer had offered to close the criminal case against Mr. Gapiirjanov in exchange for one thousand US dollars, the State party affirms that these were examined by an investigator at the time, and were found to be groundless (by official decision of 6 November 2004).

6.9 The State party finally contends that the allegations that Mr. Gapiirjanov's guilt had been established only on the basis of testimonies of three individuals to whom he had sold drugs are unfounded. The State party points out that in addition to the depositions of the three individuals in question, Mr. Gapiirjanov's guilt was also established on the basis of the depositions of other witnesses, such as Ms. Starikova, Ms. Radsulova, and Ms. Umarova. These witnesses had confirmed their depositions in a cross-examination together with Mr. Gapiirjanov. His guilt was also established on the basis of forensic-chemical experts' conclusions, material, and other objective and corroborating evidence that were declared admissible by the courts.

Author's comments on the State party's observations

7.1 The author presented her comments on 3 April 2009. She reiterates her previous allegations. In particular, she contends that the State party's affirmation that her son was involved in drug traffic was unfounded. In her opinion, the accusation against her son was based on the testimonies of individuals who were former or current drug-addicts. These individuals had an interest in incriminating her son, in order to avoid the engagement of their own liability. All complaints in this respect were, according to the author, ignored by the authorities and her son's sentence was upheld.

7.2 The author further recalls that when her son was arrested on 11 August 2004, in Batskikh's home, there were three other individuals present, including a lady. These individuals were never interrogated during the preliminary investigation; this was due to the fact, according to the author, that Batkhsih had in fact organised a brothel in his house, and in order to avoid charges, had designated Mr. Gapiirjanov as a drug seller. Even if the author's son had had an alibi, the investigators interrogated a witness who could confirm this only two and a half months later.

7.3 The author reiterates that the search and the cutting out of her son's pockets were carried out in the absence of official witnesses. The author also recalls her allegations that during the discovery of the 0.11 grams of heroin in her son's home, the official witnesses had not been present as they were asked to leave.

7.4 The author also repeats her claim that no lawyer was present at the initial stages of the investigation, in spite of her son's repeated requests to this effect. She reiterates that later, her son's lawyers had to be changed, because they were put under pressure by the investigation and could not fully comply with their duties.

7.5 The author concludes by reiterating that the criminal case contained no direct evidence of her son's guilt, and that the appeal examination of her son's case by the Tashkent City Court on 11 March 2008 was conducted in a formalistic way, her son had not been interrogated, and Mr. Batskikh or other witnesses were not present in court.

Issues and proceedings before the Committee

Consideration on the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's allegations that her son was subjected to beatings by the police officers in an attempt to force him to confess guilt (see paragraphs 2.2 and 2.3 above). In substantiation, the author affirms, in particular, that shortly after his arrest, her son had been kicked on the head to the point that his left ear was damaged and he had to be taken to emergency ward at a hospital. The author also claimed that an official record confirming this was subsequently removed from her son's criminal file by the investigators. According to her, the authorities have failed to properly address her son's numerous complaints on the matter, both during the preliminary investigation and in court. The Committee further notes the State party's contention that Mr. Gapirjanov had in fact suffered from health issues and his ear problems were unrelated to physical coercion and had in fact started before his arrest, as confirmed in court by a medical expert. It also notes the State party's affirmation that these allegations had been examined by the courts and were found to be groundless.

8.3 The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially⁷. The Committee considers that the facts as presented do not demonstrate that the State party's competent authorities have given due and adequate consideration to the alleged victim's complaints of ill-treatment made both during the preliminary investigation and in court. In these circumstances, and in the absence of a sufficient response by the State party on the author's specific allegations, the Committee concludes that the facts before it amount to a violation of the author son's rights under article 7, of the Covenant. In light of this conclusion, the Committee does not consider it necessary to deal separately with the author's claim under article 10 of the Covenant.

8.4 The author had further claimed that after her son's arrest on 11 August 2004, the latter was never brought before a court or other officer authorized by law to exercise judicial power to verify the lawfulness of his detention and placement in custody, in violation of article 9, paragraph 3, of the Covenant. The Committee notes that this specific allegation was not refuted by the State party. It further notes that, from the documents on file, it appears that the decision to place Mr. Gapirjanov in custody was endorsed by a prosecutor, even though no exact date is specified. The Committee recalls⁸, however, that paragraph 3 of article 9 entitles a detained person charged with a criminal offence to judicial control of his/her detention. It is inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation

⁷ Human Rights Committee, General Comment No. 20, paragraph 14.

⁸ See, inter alia, Rozik Ashurov v. Tajikistan, Communication No. 1348/2005, Views adopted on 20 March 2007, paragraph 6.5; Kulomin v. Hungary, Communication No. 521/1992, Views adopted on 22 March 1996, paragraph 11.3; Platonov v. Russian Federation, Communication No. 1218/2003, Views adopted on 1 November 2005, paragraph 7.2.

to the issues dealt with. In the circumstances of the present case, the Committee is not satisfied that the public prosecutor can be characterized as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, and concludes, therefore, that there has been a violation of this provision.

8.5 The Committee further notes the author's various allegations of violations of her son's rights under article 14, paragraph 1, of the Covenant, that his trial was biased and his sentence unfounded. It also notes that the State party has not specifically refuted these allegations, but affirms, in general terms, that the alleged victim's guilt was duly established, on the basis of a multitude of corroborating testimonies and other evidence, and that at all stages, the alleged victim's procedural rights were respected. In the absence of any further information of relevance on file, the Committee considers that the facts as presented do not provide the basis for a finding of a violation of Mr. Gapirjanov's rights under this provision of the Covenant.

8.6 The author has also claimed a violation of her son's rights under article 14, paragraph 3 (b) and (d) of the Covenant. The State party has contended that Mr. Gapirjanov was assigned an ex-officio lawyer from the moment of arrest, and that, subsequently, he had to have his lawyer changed on a number of occasions, at his own request. The author has not refuted these contentions specifically but has replied without providing further details, that her son's lawyers had changed because they were placed under pressure by the investigation. In the circumstances, and in light of the contradictions in the parties' submissions, and in absence of other pertinent information on file, the Committee concludes that the facts as submitted do not provide the basis for a finding of a violation of Mr. Gapirjanov's rights under these provisions of the Covenant.

8.7 The author has finally invoked, in general terms, a violation of her son's rights under article 14, paragraph 3 (e) of the Covenant, as a witness who could confirm her son's alibi was not questioned, that the courts failed to call other witnesses or to order additional experts' analyses, etc. In the absence of any other pertinent information, however, the Committee concludes that the facts as submitted do not provide the basis for a finding of a violation of Mr. Gapirjanov's rights under this provision of the Covenant.

9. 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 before it disclose a violation of Mr. Gapirjanov's rights under article 7 and article 9, paragraph 3, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Gapirjanov with an effective remedy, including appropriate compensation and initiation and pursuit of criminal proceedings to establish responsibility for Mr. Gapirjanov's ill-treatment. The State party is also under an obligation to avoid similar violations in the future.

11. 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 in case a violation has been established, 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 Committee's Views.

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