



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2337/2014*, **

<i>Communication submitted by:</i>	Oleg Volchek (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	29 November 2013 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 22 January 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	23 July 2020
<i>Subject matter:</i>	Arrest and detention of human rights activist; lack of fair trial in administrative case
<i>Procedural issues:</i>	Exhaustion of domestic remedies; lack of substantiation
<i>Substantive issues:</i>	Arbitrary arrest and detention; fair trial; discrimination on political grounds
<i>Articles of the Covenant:</i>	9 (1) and (3), 14 (1), (3) (b) and (5) and 26
<i>Article of the Optional Protocol:</i>	2

1. The author of the communication is Oleg Volchek, a national of Belarus born in 1967. He claims that the State party has violated his rights under articles 9 (1) and (3), 14 (1), (3) (b) and (5) and 26 of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is not represented by counsel.

The facts as submitted by the author

2.1 The author is a human rights activist and since 1998, has been the head of a human rights centre that provides legal assistance to the public. On 27 January 2012, at 3.15 p.m.,

* Adopted by the Committee at its 129th session (29 June–24 July 2020).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi.



he was stopped by two plain-clothed police officers, S. and L., who asked to see his passport. When the author failed to produce his passport, they took him to the Central District police department in Minsk. The author was searched and his personal belongings were taken away for half an hour by the arresting officers. His belongings were then returned and a record of the personal search was drawn up by another officer, K., in the presence of one witness, the arresting officer L. Subsequently, officer K. drew up the record of arrest under article 17 (1) of the Administrative Offences Code (petty hooliganism), based on the arresting officers' statement in which they indicated that the author had been disturbing people on the street by shouting loudly and using offensive language.¹

2.2 On the same day, the Head of the Central District police department in Minsk decided to detain the author before the court hearing. The author was detained in Minsk Correction Centre. The author's relatives and his lawyer were not informed of his whereabouts, despite his request to that effect. The author was not informed of the charges against him. On 30 January 2012, the author's case was heard in the Central District Court in Minsk. The author was sentenced to four days of administrative detention under article 17 (1) of the Administrative Offences Code. The time of detention was calculated from the time of his arrest at 3.30 p.m. on 27 January 2012. The court's decision was based on the testimony of the only two witnesses in his case – the two arresting officers – who stated that in response to their request to see his passport, the author had started shouting and using offensive language, thus disrupting public order and disturbing the peace.

2.3 The author's appeal, dated 6 February 2012, to Minsk City Court was denied on 17 February 2012. The appeal court found that the court of first instance had correctly assessed the evidence in the author's case and that the sanction imposed on him was lawful. The author's supervisory review requests, dated 19 May and 11 July 2012, to the President of the Supreme Court, were denied on 21 June and 20 August 2012, respectively.

2.4 According to the author, the court was not independent, and the arresting officers had a private conversation with the judge before the hearing. They were present at the hearing and escorted him to the court. The judge was biased and took an accusatory approach. He prohibited journalists from making audio recordings in the court. The author met with his lawyer just before the court hearing and only then was he able to read the information in his file. The sanction chosen by the court was unjustified in view of the circumstances of his case. The Minsk City Court, acting as the second instance court, failed to review his appeal on the basis of the facts, as required by article 14 (5) of the Covenant.

2.5 The author alleges that while he was detained, his passport disappeared from his office. He claims that the police officers used his key, which they had confiscated from him, to open his office. On 2 February 2012, the author submitted a complaint to the Head of the Investigative Committee in Minsk, claiming that his passport had been stolen and requesting that a criminal investigation be initiated. On 26 April 2012, the Prosecutor of the Central District in Minsk rejected the author's request on the basis that there was a lack of evidence that the theft had taken place. The author received a new passport after a two-month period, instead of 15 days, which disrupted his travel schedule to human rights-related events taking place abroad.

The complaint

3.1 The author claims that his detention by the police and his subsequent arrest, imposed as a sanction by the court, amounted to a violation of article 9 (1) of the Covenant. He also claims that the failure of the authorities to notify him of the charges against him, to inform his family and his lawyer about his arrest, and to bring him promptly before a judge violated article 9 (3) of the Covenant. He claims a further violation of article 9 (3) because the Head of the Central District police department in Minsk, not a judge, authorized his detention.

3.2 In addition, the author claims that the biased and accusatory approach of the judge in the District Court violated article 14 of the Covenant. The fact that the decision of the District Court was based solely on evidence provided by the arresting officers was also in violation

¹ According to the author, the record had been prepared earlier and was then amended by hand by officer K., who told the author that he received an order "from above" to carry out his detention.

of article 14. The lack of adequate time and facilities to prepare his defence violated his rights under article 14 (3) (b). The failure of the appeal court to duly assess the facts of his case was in violation of article 14 (5).

3.3 Furthermore, the author claims that the State party violated article 26 of the Covenant, as both his arrest and the authorities' refusal to issue his new passport under the 15-day emergency procedure were based on his political opinions and his human rights activism.

State party's observations on the merits

4.1 In a note verbale dated 12 June 2015, the State party submitted its observations on the merits of the communication. According to the State party, the author's administrative offence was duly established by the domestic courts. The sanction imposed was chosen in accordance with the law and did not reach the maximum established in the relevant provision. The court reviewed the author's case on the day it was brought before it. The time the author had already spent in detention was included in the total duration of his detention. According to the case file, the author did not submit any requests, including a request for a lawyer. He was represented by a lawyer in court.

4.2 In violation of article 8 (6) of the Code of Administrative Procedure and Enforcement, the personal search of the author by the police was carried out in presence of only one, not two witnesses. However, given that the items found were not related to the administrative process, that violation had no effect on the final court decision in the author's case. Indeed, the author signed the record regarding the search without raising any objections.

4.3 The State party finds no grounds to change the administrative decision in the author's case.

Author's comments on the State party's observations

5.1 On 23 June 2015, the author submitted his comments on the State party's observations. He notes that he has exhausted all domestic remedies, having applied twice to courts under the supervisory review procedure, which, in any event, is not considered by the Committee to be an effective remedy.

5.2 The author reiterates the allegations raised in his initial submission that the District Court based its decision solely on the testimony of the arresting police officers, who were not objective witnesses. There were no other witnesses or evidence in his case. He reiterates his claims concerning the breach during the individual search procedure and the ensuing theft of his passport, and reiterates that he was not brought promptly before a judge. He refers to articles 10 (30) (2) and 11 (2) of the Code of Administrative Procedure and Enforcement, according to which cases of administratively detained persons must be brought to court within 48 hours.

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 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under 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 notes that the author claims that he has exhausted the available domestic remedies and that the State party has not objected to that claim. The Committee also notes the author's claim under article 14 (3) (b) that he did not have adequate time and facilities to prepare for the court hearing and that he met with his lawyer only just before the hearing. The Committee further notes that the trial transcript of the District Court hearing, available on file, contains no complaint by the author or his lawyer concerning a lack of time for preparation of a defence or a request to adjourn the hearing. In the light of the information before it, the Committee finds that the author has failed to exhaust domestic remedies

regarding this part of the communication and that it is therefore inadmissible under article 5 (2) (b) of the Optional Protocol. The Committee considers that it is not precluded by virtue of article 5 (2) (b) of the Optional Protocol from examining the rest of the communication.

6.4 The Committee notes the author's claim that the four-day administrative sentence imposed on him by the Central District Court in Minsk on 30 January 2012 violated his rights under article 9 (1) of the Covenant. The Committee recalls that it is generally for a State party's courts to evaluate the facts and the evidence, or the application of domestic legislation, in a particular case, unless it can be ascertained that the evaluation or application was clearly arbitrary or amounted to a denial of justice, or that the court failed in its duty to maintain independence and impartiality.² In the present case, the Committee notes the State party's arguments that the court decided on the author's administrative case on the day it was brought before it, that the author's time in detention before the court hearing took place was included in the overall duration of his administrative arrest, and that the sanction chosen by the court was within the limits prescribed by article 17 (1) of the Administrative Offences Code. From the information on file, the Committee cannot conclude that the Central District Court in Minsk acted arbitrarily or lacked impartiality. The Committee therefore finds the related claims of the author under article 9 (1) of the Covenant to be insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

6.5 The Committee notes the author's claim that his detention from 27 to 30 January 2012 violated his right to be brought promptly before a judge under article 9 (3) of the Covenant. The Committee notes that article 9 (3) applies to persons arrested or detained on criminal charges. The Committee must therefore decide whether the author's administrative detention falls under article 9 (3). In this regard, the Committee recalls that, although criminal charges relate in principle to acts declared to be punishable under domestic criminal law,³ the concept of a "criminal charge" has to be understood within the meaning of the Covenant.⁴ In the present case, the author was punished for an administrative offence and sanctioned with four days' administrative arrest. The Committee considers that such a penalty had the aims of sanctioning the author for his actions and serving as a deterrent for future similar offences – objectives analogous to the general goal of the criminal law.⁵ The Committee therefore finds that these claims fall under the protection of article 9 (3) of the Covenant.

6.6 The Committee notes the author's claims under article 14 (1) concerning a lack of independence of the court and its assessment of evidence in his case, namely the fact that the court decision was based solely on the statements of the two arresting officers. The Committee notes that the author's claim concerns the evaluation of the facts and the evidence, which the Committee does not review, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court failed in its duty to maintain independence and impartiality.⁶ The information before the Committee does not allow it to conclude that the court proceedings suffered from any such failure. The Committee therefore finds the author's claim under article 14 (1) to be insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

6.7 In line with its finding that the administrative charges against the author were criminal in nature, the Committee considers that the author's claim under article 14 (5) of the Covenant, regarding the lack of substantive review of his appeal by Minsk City Court, fall within the scope of article 14. The Committee notes, however, that the decision of Minsk City Court does not merely refer to the procedural aspects of the hearing performed by the District Court, but to the "information on file", which indicates that the court did engage in an evaluation of facts and evidence and did not limit the review to points of law only. Accordingly, the Committee finds the author's claims under article 14 (5) to be insufficiently substantiated for

² For example, *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.

³ Human Rights Committee, general comment No. 32 (2007), para. 15.

⁴ *Osiyuk v. Belarus* (CCPR/C/96/D/1311/2004), para. 7.3; and *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), para. 13.7.

⁵ See, *mutatis mutandis*, *Osiyuk v. Belarus*, para. 7.4.

⁶ *Osiyuk v. Belarus*, para. 7.3; and *Zhagiparov v. Kazakhstan*, para. 13.7.

the purposes of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.8 Furthermore, the Committee notes that the information on file is not sufficient to substantiate the author's claims under article 26 of the Covenant concerning the political motivation of his arrest, and declares this part of the complaint inadmissible under article 2 of the Optional Protocol.

6.9 The Committee considers the remainder of the author's claims under article 9 (1) and (3) of the Covenant concerning his three-day administrative detention by the police from 27 to 30 January 2012 and the delay in bringing him before a judge admissible and proceeds to their consideration on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, as provided under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that his rights under article 9 (1) and (3) of the Covenant were violated when he was detained on 27 January 2012 on charges of an administrative offence and kept in detention, authorized by the Head of the Central District police department in Minsk, until 30 January 2012, when he was taken to court. The Committee also notes the author's claim that the maximum delay within which an administratively detained person must appear before a judge is 48 hours. The Committee refers to its general comment No. 35 (2014), which clarifies that article 9 (1) requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer, where individuals may be detained, when the detained person must be brought to court and legal limits on the duration of detention (para. 23). Although the State party did not address the author's allegations about prolonged detention, the Committee notes that articles 10 (30) (2) and 11 (2) of the Code of Administrative Procedure and Enforcement, referred to by the author, do not seem to establish time limits for administrative detention and for bringing administrative cases to court. Such time limits are set out in article 8 (4) (2) of the Code, which limits administrative detention authorized by the agency that carries out the administrative proceedings to 72 hours. Article 10 (30) (1) of the Code sets a maximum delay of five days for bringing administrative cases before a court.

7.3 At the same time, the Committee refers to paragraph 12 of its general comment No. 35, in which it clarified the notion of arbitrary detention, indicating that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. Applying this definition to the present case, the Committee notes that neither the documents on file nor the observations of the State party offer justification as to why the author's detention for three days was necessary. The Committee thus finds that the author's detention from 27 to 30 January 2012 was not reasonable, necessary or proportionate to the alleged misconduct and was therefore arbitrary, in violation of article 9 (1) of the Covenant.

7.4 Regarding the author's claim under article 9 (3) that he was not promptly brought before a judge, the Committee notes its position, indicated in its general comment No. 35 (2014), that 48 hours is ordinarily sufficient to prepare an individual for the judicial hearing and that any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances (para. 33). The Committee notes that not only should this requirement apply equally to cases involving prolonged administrative detention, but also that it should be even stricter in cases of minor offences, such as the present case. In the absence of information from the State party on the existence of any exceptional

circumstances in the present case to justify a delay in bringing the author before a judge, the Committee finds a violation of article 9 (3) of the Covenant.⁷

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 9 (1) and (3) of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to take appropriate steps to provide the author with adequate compensation for the violation suffered. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. 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 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 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 disseminate them widely in the official languages of the State party.

⁷ In October 2018, the Committee recommended that the State party bring its administrative detention legislation and practices into compliance with article 9 of the Covenant, taking into account the Committee's general comment No. 35 (2014) (CCPR/C/BLR/CO/5, para. 34).