



# Convention on the Elimination of All Forms of Discrimination against Women

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## Committee on the Elimination of Discrimination against Women

### Decision adopted by the Committee under article 4 (2) (c) of the Optional Protocol, concerning communication No. 98/2016<sup>\*,\*\*</sup>

<i>Communication submitted by:</i>	K.K.
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	7 December 2015 (initial submission)
<i>References:</i>	Transmitted to the State party on 18 January 2016
<i>Date of adoption of decision:</i>	25 February 2019

\* Adopted by the Committee at its seventy-second session (18 February–8 March 2019).

\*\* The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Nicole Ameline, Gunnar Bergby, Marion Bethel, Louiza Chalal, Naéla Mohamed Gabr, Hilary Gbedemah, Nahla Haidar, Dalia Leinarte, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Ana Peláez Nerváez, Rhoda Reddock, Elgun Safarov, Wenyan Song, Genoveva Tisheva, Franceline Toé-Bouda and Aicha Vall Verges.



## Background

1. The author is K.K., a Russian national born in 1983. She claims a violation of her rights guaranteed by articles 2 (b), (d) and (e), 5 (a) and 7 (c) of the Convention. The Russian Federation ratified the Convention and the Optional Protocol thereto on 23 January 1981 and 28 July 2004, respectively.

## Facts as submitted by the author

2.1 The author, who is an activist for lesbian, gay, bisexual and transgender rights and a volunteer legal counsel for the organization Vykход, was invited to assist with running the QueerFest festival held in 2013. On 19 September 2013, at the entrance of the building in which the event was held, she saw a deputy of the Saint Petersburg Legislative Assembly, Vitaly Milonov, with representatives of the police and several other men, whom she recognized as perpetrators of previous assaults against activists for lesbian, gay, bisexual and transgender rights. Under instructions from Mr. Milonov, the police requested that the organizers of the event provide them with the lease documents for the venue. The author intervened to clarify the legal aspects of the request. At that moment, Mr. Milonov interrupted the conversation, saying that the author and other participants of the event were not Russians and that they bowed to foreign diplomats and begged them for money. Subsequently, he and his party continued to threaten and insult visitors and volunteers at the festival. In particular, he used such words as “*spidozny*”, “*petukh*” and “*petushatnik*”. With regard to women, he used the phrases “cut your hair, animal” and “beast”, and he called one woman the “husband” of another woman. He called the author “*stukachka*” and “*kovyryalka*”, when, seeing one of Mr. Milonov’s men trying to use violence against an event participant, she had asked police officers to intervene. However, the police officers took no action in response to the offensive conduct against the author.

2.2 On 30 September 2013, the author filed a request to initiate proceedings against Mr. Milonov with the Office of the Prosecutor of Saint Petersburg and with the Office of the Prosecutor of Primorsky District, under articles 5.61 (insult) and 5.62 (discrimination) of the Code of Administrative Offences of the Russian Federation. The Office in Primorsky District rejected the request on 17 October 2013 on the grounds that the Code of Administrative Offences did not contain any regulations with regard to the administrative liability of deputies, because deputies of the Legislative Assembly had immunity and any prosecution against them must be regulated by a special federal law, but such a law had not been adopted. The author appealed to the Primorsky District Court of Saint Petersburg on 30 January 2014, requesting that the decision of the Office of the Prosecutor of Primorsky District be quashed. On 20 March 2014, the Primorsky District Court of Saint Petersburg rejected the appeal.

2.3 On 9 November 2013, the author filed a civil lawsuit against Mr. Milonov with the Oktyabrsky District Court of Saint Petersburg asking the court to protect her honour and dignity and to recognize a violation of her moral rights.<sup>1</sup> The case was transferred to the Kirovsky District Court, due to its jurisdiction. On 29 April 2014, the lawsuit was rejected, in a decision stating that there was no evidence proving that the defendant had made offensive statements.

2.4 On 28 May 2014, the author appealed to the Saint Petersburg City Court against the decision of the Kirovsky District Court. On 14 October 2014, the Saint Petersburg City Court denied the appeal.

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<sup>1</sup> In addition, the filings contained requests to prohibit the defendant from using offensive words and expressions in reference to the author and to recover compensation and moral harm in the amount of 100,000 roubles.

2.5 On an unspecified date, the author filed a cassation appeal to the Presidium of the Saint Petersburg City Court. On 27 February 2015, the Presidium denied the appeal, stating that the basis for revocation or amendment of a court ruling under the cassation procedure required a material violation of substantive and procedural norms of law, which had not been found in this case.

### **Complaint**

3.1 The author claims that the State party has not provided effective legal protection tools and has not recognized the violation of her rights nor provided compensation or application of any other procedures aimed to restore her rights.

3.2 The author alleges a violation of her rights under articles 2 (b), (d) and (e) of the Convention, due to the humiliation and insult of her honour and dignity on the basis of her sexual orientation and gender identity and her affiliation with the lesbian, gay, bisexual and transgender communities.

3.3 The author also claims violation of her rights under article 5 (a) of the Convention, because she was humiliated and insulted for her non-compliance with stereotypes regarding the traditional role of women in gender relations and the social roles of lesbian, bisexual and transgender women.

3.4 Furthermore, the author claims a violation of article 7 (c) of the Convention, due to the discrimination and negative attitude that she experienced working as an advocate for an organization for lesbian, gay, bisexual and transgender rights.

### **State party's observations on admissibility**

4.1 On 6 May 2016, the State party submitted its observations on the admissibility of the communication. According to it, the communication is inadmissible, because the author has not exhausted all available domestic remedies, given that she has not appealed the decision of the Kirovsky District Court to the Supreme Court of the Russian Federation under the cassation procedure. The State party notes that, in accordance with the Civil Procedure Code, a cassation appeal may be submitted within six months from the date on which a court decision enters into force, and that, if the deadline is missed, an appellant may petition the court to extend the deadline. The State party refers to the case concerning *Abramyan v. Russian Federation*,<sup>2</sup> in which the European Court of Human Rights ruled that, before submitting a complaint to the Court, an appellant must exhaust cassation appeals, which in that case applied to a regional cassation court and to the Supreme Court of the Russian Federation.

4.2 The State party notes that the author could have also submitted a complaint to the federal or regional ombudsperson. An ombudsperson is independent in his or her actions and does not report to any State authorities and therefore could have ensured an objective consideration of the author's complaint.

4.3 The State party asserts that the author's communication is also inadmissible due to non-substantiation. According to the State party, the submitted documents show that the national authorities have provided the author with lawful, reasoned and timely responses to her complaints and that the courts have carried out justice based on an adversarial approach and the principle of equality of the parties. The court of first instance found that the defendant's words could not be construed as insults, and that decision was confirmed by both the appellate and cassation courts. The State party notes that the evidence presented by the author, including witness testimonies and

<sup>2</sup> See European Court of Human Rights, *Abramyan et al. v. Russian Federation* (applications Nos. 38951/13 and 59611/13), judgment of 12 May 2015.

video material, were fully and objectively studied by the courts and that that was reflected in their decisions.

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

5.1 On 11 July 2016, the author submitted comments to the State party's observations on admissibility. She agrees that the Civil Procedure Code of the Russian Federation allows her to submit a cassation appeal to the Supreme Court of the Russian Federation. However, pursuant to article 387 of the Civil Procedure Code, judicial decisions of lower courts may be amended or quashed under the cassation procedure only in cases of major violations of the rules of material law or of the rules of procedural law that have affected the outcome of the case. The author notes that her civil lawsuit was rejected because the court did not recognize that her dignity had been denigrated by the defendant or that the expressions he used towards her could be characterized as insults. As follows from the decision of 27 February 2015 of the Saint Petersburg City Court, which considered her cassation appeal, the author's arguments in her appeal were aimed at re-evaluating the basis for the conclusions of the first instance and appellate courts and thus could not be considered by the cassation court. Therefore, further appeal to the Supreme Court was not and could not be a legal remedy capable of bringing about the desired result.

5.2 The author also notes that, in order for a cassation appeal to be examined by the courts, it must first be considered by a single cassation court judge who determines whether the appeal will be examined by the bench, which makes this process discretionary.

5.3 The author further submits that, in her case, the deadline for a cassation appeal expired on 15 April 2015 (six months from the issuance of the appellate court decision), and the decision of the European Court of Human Rights in *Abramyan v. Russian Federation* was adopted on 15 May 2015. Before that case, the European Court of Human Rights and the United Nations treaty bodies had recognized first and second instance courts as effective legal remedies within the civil procedure of the Russian Federation, whereas the courts of higher authority, and the related supervisory review procedure, were not recognized as such.<sup>3</sup> The author asserts that, after the ruling in the *Abramyan* case, the State amended the domestic civil procedure law by renaming the cassation instance as appellate, and the supervisory review instance as cassation. At the time in which the initial submission in the present communication was submitted, the author relied on the existing approach that only the appellate court constituted an effective legal remedy. The author notes that the Committee on the Elimination of Discrimination against Women has already recognized the ineffectiveness of the cassation and supervisory appeal processes within the framework of the amended Civil Procedure Code of the Russian Federation.<sup>4</sup>

5.4 With regard to the appeal to the Ombudsperson of the Russian Federation, the author submits that such an appeal does not constitute and is not recognized by a single international body as an effective domestic remedy. In accordance with article 27 of the Federal Constitutional Law on the Human Rights Ombudsperson in the Russian Federation, the Ombudsperson is required, on the basis of the outcome of submitted complaints, to forward conclusions with recommendations to those authorities whose actions violate citizens' rights and freedoms. Such findings do not reinstate the violated rights and do not serve as a recognition of a violation on the part of the State, insofar as those powers are given only to courts and administrative bodies. The author notes that the European Court of Human Rights has found that

<sup>3</sup> *Nikolai Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4.

<sup>4</sup> *Medvedeva v. Russian Federation* (CEDAW/C/63/D/60/2013), paras. 10.3–10.5.

recourse to an ombudsperson does not constitute an effective domestic remedy within the meaning of article 35 of the European Convention on Human Rights.<sup>5</sup>

5.5 The author notes that, similarly to the federal Ombudsperson, submissions by the Human Rights Ombudsperson for Saint Petersburg to the local authorities have been given no attention and have not resulted in any legal consequences for perpetrators of violations. For example, in September 2014, the Ombudsperson for Saint Petersburg addressed the Chairman of the Legislative Assembly of Saint Petersburg in connection with the fact that a group of individuals under the leadership of Mr. Milonov had blocked the entrances to the hall where the QueerFest festival was being held in 2014, locking more than 100 people inside, and had sprayed an unknown gas and colorant at the location. There has been no reaction to that submission.

5.6 As to the State party's submission on the absence of the fact of insult, the author refers to the conclusion of a forensic linguistic examination conducted in another case, in the period 2015–2016, by the Kirovsky District Court of Saint Petersburg, in which a civil case was brought against Mr. Milonov by local activists for lesbian, gay, bisexual and transgender rights, male and female, for insulting them in a homophobic manner. The forensic expert in that case testified that the word "*kovyryalka*", when directed at a particular individual, is used as an insult and maintains its insulting meaning in practically any context. The author notes that the conclusions of the forensic expert are no different from the conclusions presented by a specialist in her case, however, in both cases, the claims were rejected. The author submits that this underscores the fact that the Russian Federation completely lacks domestic legal remedies against the discriminatory acts committed by the deputy of the Saint Petersburg Legislative Assembly, Mr. Milonov, against socially vulnerable groups within the population, such as lesbian, gay, bisexual and transgender persons and their rights defenders.

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

6.1 On 6 May 2016, the State party submitted its observations on the merits. It notes that, when deciding the author's lawsuit against Mr. Milonov, the Kirovsky District Court based its decision on the Constitution of the Russian Federation, the Civil Code and resolutions of the Supreme Court and found that there were no grounds for judicial protection of the author's rights, because Mr. Milonov was expressing his subjective opinion and views. The State party submits that, upon analysing the collected evidence, including video footage of the 19 September 2013 events, the conclusions of the psychologist and linguists and the testimonies of witnesses, the Kirovsky District Court did not find the defendant's words to be insulting or degrading to the honour and dignity of the author, because the words and phrases did not personally characterize the author, did not contain insulting, swear or abusive words and simply reflected the subjective opinion of the defendant towards the happenings, which he was free to express under the Constitution and international law. The court held that, just because the defendant had critically expressed his opinion and had disrespected the author by referring to her intimately by the pronoun *ti*, his actions could not be characterized as insulting or as degrading the honour, dignity and reputation of the author. The defendant's attitude could have been the result of a conflict situation or could have been triggered by other factors, however, his actions do not contain elements of nationalism, xenophobia or misogyny, as argued in the lawsuit.

<sup>5</sup> European Court of Human Rights, *Makarov v. Russian Federation* (application No. 15217/07), judgment of 12 March 2009, para. 83.

6.2 The State party further submits that the author's claim that the video footage shows the manner in which Mr. Milonov directly addresses her and calls her "*kovyryalka*", which is jargon referring to the author's intimate relationships, is a speculation and has not been supported by the submitted evidence. Both parties have submitted to the court conclusions made by specialist linguists about the meaning of that word. The author has claimed that it means "a lesbian" and was used in the sense of the worst insulting slang used in women's prisons. However, the first instance court has determined that the meaning of the word, as claimed by the author, was not widely known to the general public and that there were no grounds to believe that Mr. Milonov knew that specific meaning of the word. The court took into consideration the conclusion by the specialist linguist who testified that the word "*kovyryalka*" had many meanings and that not all of them were offensive and, according to various published dictionaries, the word had even more non-offensive meanings. The court determined that the defendant had said the word at almost a whisper and without expressing any emotion. His representative argued that he did not even remember saying the word and that, even if he did, he would not ascribe to it the same meaning as the author.

6.3 The State party notes that, in accordance with article 1 of the Convention, discrimination against women means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The national courts came to the conclusion that there had been no violation of the author's personal, non-pecuniary rights, including the right not to be subjected to a discrimination. The State party also notes that the evaluation of evidence and application of national law is within the competence of national authorities, including courts. Therefore, it considers that there has been no violation of the Convention in the present case.

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

7.1 In her comments dated 25 November 2016, the author reiterated her position that, at a public human rights event, she had been discriminated against by a representative of the State authorities, who came to the venue and made statements that the author found offensive and humiliating. The author insists that the humiliation of her honour and dignity and the insults made on the basis of her sexual orientation were instances of discrimination against her as a member of a vulnerable group, lesbian, bisexual and transgender women, and based on her sexual orientation and gender identity and her affiliation with her work relating to advocacy for lesbian, gay, bisexual and transgender human rights. The author also states that she was humiliated and insulted due to her non-compliance with the stereotypes regarding the traditional role of women in gender relations and in the family and regarding the social role of lesbian, bisexual and transgender women. She claims that the words used against her, the level of rhetoric of which exclusively belonged in the criminal environment in detention facilities, were aimed at associating her with the context of that criminal environment in order to marginalize her and create an impression that her lifestyle was criminal.

7.2 The author submits that, even though she appealed to the national authorities for the protection of her rights to equality and non-discrimination, respect for private life, honour and dignity, the authorities dismissed her claims, failing to provide her with effective legal remedy. The author also submits that the principles of non-discrimination and equality require the establishment of substantive equality, not just legal or formal equality. Substantive equality requires an individual approach to the specific needs of certain vulnerable groups and the elimination of any obstacles

that they may encounter. The author notes that she is especially vulnerable to discrimination prohibited under the Convention, given that she is a member of a lesbian, bisexual and transgender women's group and a human rights defender. According to the author, discrimination against women on the basis of their sex and gender identity is closely linked with other factors affecting women, such as their social status and sexual orientation. Therefore, the State party must legally recognize and prohibit such intersecting forms of discrimination and their cumulative negative effects on women. The author notes that the Human Rights Committee has ruled that the reference to "sex" in articles 2 (1) and 26 of the International Covenant on Civil and Political Rights includes sexual orientation.<sup>6</sup> In the light of the foregoing, the author contends that she has been a victim of discrimination within the meaning of article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

7.3 The author submits that international bodies regularly express their concern about reports of cases of discrimination and use of hate speech, including against lesbian, bisexual and transgender women. She refers to the concluding observations of the Committee on the eighth periodic report of the Russian Federation (CEDAW/C/RUS/CO/8), in which the Committee expressed its concern about reports of discrimination, harassment and hate speech, based on negative stereotyping, against lesbian, bisexual and transgender women and intersex persons and urged the State party to provide the necessary protection from discrimination for such women (ibid., paras. 41–42). The author notes that her particular vulnerability to various forms of discrimination imposes an obligation on the State party not just to refrain from such actions but to carefully investigate reports of discrimination against her as a member of a vulnerable group. The author also makes note of the recommendation of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity<sup>7</sup> and the jurisprudence of the European Court of Human Rights<sup>8</sup> as steps taken by other international bodies to combat discrimination on the basis of sexual orientation or gender identity. The author is of the view that the State party failed to provide her with effective legal remedies to account for the fact that the discrimination against her was perpetrated by a person acting as a State official and failed to provide recognition and denouncement of the violation of her rights or compensation or application of any other procedures aimed at restoring her violated rights. The author also notes that Mr. Milonov is currently serving as a member of the State Duma, the lower house of the federal parliament of the Russian Federation.

### Issues and proceedings before the Committee

8.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted or that the application of such

<sup>6</sup> See *Toonen v. Australia* (CCPR/C/50/D/488/1992), para. 8.7.

<sup>7</sup> Recommendation of the Committee of Ministers of the Council of Europe to its member States of 31 March 2010 on measures to combat discrimination on grounds of sexual orientation or gender identity. Available from [www.coe.int/en/web/sogi/rec-2010-5](http://www.coe.int/en/web/sogi/rec-2010-5).

<sup>8</sup> European Court of Human Rights, *Vejdeland and others v. Sweden* (application No. 1813/07), judgment of 9 February 2012, paras. 45–46.

remedies is unreasonably prolonged or unlikely to bring effective relief.<sup>9</sup> In that connection, the Committee notes the State party's argument that the communication should be declared inadmissible under that provision, because the author has failed to lodge a cassation appeal with the Supreme Court against the decision of the lower court of 29 April 2014 and the decision of the appellate court of 14 October 2014. The Committee also notes the State party's reference to *Abramyan v. Russian Federation*,<sup>10</sup> in which the European Court of Human Rights ruled that, prior to submitting a complaint under the European Convention on Human Rights, one must exhaust cassation appeals. In addition, the State party submits that the author could have submitted a complaint to the regional or federal ombudsperson.

8.3 The Committee observes that, pursuant to article 387 of the Civil Procedure Code, the grounds for cancellation or alteration of judicial decisions in the cassation procedure are major violations of the rules of material law or of the rules of procedural law that have affected the outcome of the case. The Committee notes the author's assertion that her civil lawsuit was rejected because the court did not recognize that her dignity had been denigrated by the defendant or that the expressions he used towards her could be characterized as insults. The Committee also notes the author's argument that her cassation appeal to the Saint Petersburg City Court challenged not the legality but the conclusions of the first instance and appellate courts, which could not be considered by a cassation court, and that, therefore, further appeal to the Supreme Court was not and could not be a legal remedy capable of bringing about the desired result.

8.4 The Committee recalls its jurisprudence,<sup>11</sup> in which it established that the cassation procedure was the review primarily of the legality of lower court decisions. Given that, in the present case, the author has petitioned the higher courts to re-evaluate the provided evidence and facts, the Committee considers that a further appeal in cassation would not constitute an effective remedy for the author. With regard to the State party's claim that the author could have submitted complaints to the regional or federal ombudsperson, the Committee refers to the jurisprudence of the Human Rights Committee<sup>12</sup> and the European Court of Human Rights,<sup>13</sup> according to which an ombudsperson institution does not constitute an effective remedy. The Committee sees no reason to reach a different conclusion on the issue in the present case.

8.5 The Committee notes the author's claims under articles 2 (b), (d) and (e), 5 (a) and 7 (c) of the Convention. According to the author, the State party failed to recognize the discrimination and humiliation that she had suffered due to her sexual orientation and gender identity. The Committee also notes that the State party has submitted that, upon considering the author's lawsuit, the national courts did not find the defendant's words to be insulting or degrading to the honour and dignity of the author, because those words and phrases did not personally characterize the author, did not contain insulting, swear or abusive words and reflected only the subjective opinion of the defendant towards the happenings, which he was free to express under the Constitution of the Russian Federation and international law. It further notes that the State party has pointed out that the national courts concluded that there had been no violation of the author's personal, non-pecuniary rights, including the right not to be subjected to discrimination.

<sup>9</sup> *E.S. and S.C. v. United Republic of Tanzania* (CEDAW/C/60/D/48/2013), para. 6.3; and *L.R. v. Republic of Moldova* (CEDAW/C/66/D/58/2013), para. 12.2.

<sup>10</sup> European Court of Human Rights, *Abramyan v. Russian Federation*.

<sup>11</sup> *Medvedeva v. Russian Federation*, para. 10.4.

<sup>12</sup> *Salikh v. Uzbekistan* CCPR/C/95/D/1382/2005, para. 6.3.

<sup>13</sup> European Court of Human Rights, *Makarov v. Russian Federation*, para. 83.

8.6 The Committee notes that, in substance, the author's claims aim at challenging the manner in which the national courts assessed the circumstances of her case and applied national law. The Committee emphasizes that it does not replace the national authorities in the assessment of the facts, nor does it decide on the alleged perpetrator's criminal responsibility.<sup>14</sup> The Committee considers that it is generally for the courts of the States parties to the Convention to evaluate the facts and evidence and the application of national law in a particular case, unless it can be established that such evaluation was biased or based on harmful gender stereotypes that constitute discrimination against women, was clearly arbitrary or amounted to a denial of justice. In that connection, the Committee notes that nothing in the material before it suggests elements likely to demonstrate that the examination by the courts of the author's case, whether regarding her claims of insult or discrimination, suffered from any such defects. The Committee observes that both sides of the lawsuit were able to put forward their specialists' opinions on the meaning of the words used towards the author, some of which had several meanings, including offensive, and that the courts determined that the author's claims of discrimination and humiliation due to her sexual orientation were not corroborated by sufficient evidence. In the light of the foregoing, and in the absence of any other pertinent information on file, the Committee considers that the communication is insufficiently substantiated for the purposes of admissibility and that it is therefore inadmissible under article 4 (2) (c) of the Optional Protocol.

9. The Committee therefore decides that:

- (a) The communication is inadmissible under article 4 (2) (c) of the Optional Protocol;
- (b) The present decision shall be communicated to the State party and to the author.

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<sup>14</sup> *R. P. B. v. Philippines* (CEDAW/C/57/D/34/2011), para. 7.5.