



**International Covenant on
Civil and Political Rights**

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Human Rights Committee
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14 March - 1 April 2011

Views

Communication No. 1769/2008

<u>Submitted by:</u>	Natalya Bondar (not represented by counsel)
<u>Alleged victims:</u>	Sandzhar Ismailov
<u>State party:</u>	Uzbekistan
<u>Date of communication:</u>	16 January 2008 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 March 2008 (not issued in document form)
<u>Date of adoption of Views:</u>	25 March 2011

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Detention and trial of the author's husband.
<i>Procedural issues:</i>	Degree of substantiation of claims.
<i>Substantive issues:</i>	Arbitrary detention, fair trial, right to defend oneself through legal assistance of one's own choosing, right to examine witnesses, self-incrimination, unlawful interference with privacy and family life.
<i>Articles of the Covenant:</i>	Article 9, paragraphs 1, 2, and 3; article 14, paragraphs 1 and 3(b), (d), (e), (g); article 17, paragraph 1.
<i>Articles of the Optional Protocol:</i>	2.

On 25 March 2011, 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. 1769/2008.

[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 (one hundredth and first session)

Concerning

Communication No. 1769/2008**

Submitted by: Natalya Bondar (not represented by counsel)
Alleged victim: Sandzhar Ismailov
State party: Uzbekistan
Date of communication: 16 January 2008 (initial submission)

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

Meeting on 25 March 2011,

Having concluded its consideration of communication No. 1769/2008, submitted to the Human Rights Committee on behalf of Mr. Sandzhar Ismailov 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, dated 16 January 2008, is Ms. Nataliya Bondar, an Uzbek national. She submitted the communication on behalf of her husband, Mr. Sandzhar Ismailov, an Uzbek national born in 1970 who is serving a prison sentence. She claims that her husband is a victim of violation by Uzbekistan¹ of his rights under article 9, paragraphs 2 and 3; article 14, paragraph 1 and paragraph 3 (b), (d), (e), (g); and article 17, paragraph 1, of the International Covenant on Civil and Political Rights.

** The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for Uzbekistan on 28 December 1995. The author is unrepresented.

The facts as presented by the author

2.1 From 2002 to 2005, Mr. Ismailov served in the Ministry of Defence as Head of the Central Intelligence Department of the Joint Staff of the Armed Forces of Uzbekistan. On 29 June 2005, he was invited to the Central Administration of the National Security Service (hereinafter NSS) on the pretext to undergo an interview for admission to the High School of the NSS. Upon his arrival, Mr. Ismailov was interrogated by agents of the NSS. Shortly after, his apartment was searched, but no evidence that would have served as a basis for bringing criminal charges against him was found. Mr. Ismailov was not provided with a lawyer during his interrogation and home search, in violation of the Uzbek legislation. The same day he was arrested by NSS agents and taken to the pre-trial detention facility of NSS without being informed of any charges against him.

2.2 On 1 July 2005, by a decision of the investigator, Mr. Ismailov was informed about his status as an accused in a criminal trial. His remand in detention was approved by the Deputy General Prosecutor of the Military Prosecutor's Office of Uzbekistan. The same day Mr. Ismailov's family hired a lawyer for his defence. However, the NSS investigator, in violation of article 116 of the Constitution and of criminal procedure legislation, did not allow the privately retained lawyer to represent the interests of the accused, invoking the confidential nature of the case. He assigned another lawyer to the case.

2.3 On 26 January 2006, the Military Court of the Republic of Uzbekistan found Mr. Ismailov guilty of offences under article 157 (treason) and article 248 (illegal ammunition storage) of the Uzbek Criminal Code. He was sentenced to 20 years' imprisonment. According to the judgment, Mr. Ismailov revealed State secrets (in particular information regarding the Uzbek Intelligence Service) and handed over files containing cryptograms related to secret negotiations to a representative of the Russian Embassy. Although Mr. Ismailov held the meeting with the Russian attaché at his place of work, he was accused of not reporting the Russian agent's interest in these issues.

2.4 On 5 February 2007, Mr. Ismailov filed a cassation appeal to the Judicial Chamber of the Military Court of the Republic of Uzbekistan. On 22 February 2007, the court dismissed his appeal, stating that his guilt had been properly established by the court of first instance.

2.5 The author (wife of Mr. Ismailov) and Mrs. Gavkhar Ismailova (Mr. Ismailov's mother) lodged numerous complaints with the Uzbek President². However, all these complaints were redirected to the Prosecutor's Office and dismissed, without any explanations as to the lawfulness of Mr. Ismailov's arrest and conviction³. On 3 December 2007, Mrs. Gavkhar Ismailova lodged a complaint with the Supreme Court on behalf of her son, which was dismissed on 24 December 2007.

2.6 The author contends that all available and effective domestic remedies have been exhausted.

The complaint

3.1 The author claims that her husband was arrested on 29 June 2005 without being informed of any charges against him, in violation of article 9, paragraph 2, of the Covenant.

² From the materials on file, it transpires that the author complained unsuccessfully on several occasions to the Minister of Foreign Affairs of the Russian Federation and the Federal Security Service of the Russian Federation, as well as to the Ambassador of the Russian Federation in Uzbekistan.

³ According to documents on file, the complaints were dismissed by the Prosecutor's Office on 17 March 2006, 23 April and 10 May 2007 respectively.

She further claims that her husband's arrest was authorized by the Deputy General Prosecutor of the Military Prosecutor's Office of Uzbekistan on 1 July 2005, in violation of article 9, paragraph 3, of the Covenant.

3.2 The author alleges that her husband's rights under article 14, paragraph 3 (b) and (d) were violated, as the investigating officer, invoking the confidential nature of the case, denied her husband's right to have the legal assistance of the lawyer hired by his family, and assigned another lawyer to the case. The author maintains that her husband met the newly assigned lawyer twice only, the first time on 1 July 2005. She claims that he was not present during the investigation acts, but signed all the reports of interrogation on 23 July 2005, after her husband had confessed guilt under pressure. Thereby, the accusation restricted Mr. Ismailov's constitutional and procedural rights to appeal against the acts and decisions of the investigator, including against the decision in relation to his illegal arrest, due to the fact that he was prevented from having the assistance of a lawyer of his own choosing for the preparation of the respective appeals. The author submits that it was only during the trial that the privately retained lawyer was able to represent Mr. Ismailov.

3.3 The author further alleges that the criminal investigation was incomplete and refers to the inconsistency between the conclusions of the courts and the factual circumstances of her husband's case. During the pre-trial investigation as well as at the time of court proceedings, her husband's requests to summon and examine several witnesses who would have testified in his favor and whose testimonies were important for the outcome of the criminal case, were repeatedly denied, in violation of article 14, paragraph 3 (e), of the Covenant. The courts refused, *inter alia*, to issue a subpoena to hear the testimony of citizens of Russian Federation to whom Mr. Ismailov allegedly revealed State secrets. She claims that it would have been possible for the court to do so in accordance with the Minsk Convention "On Legal Assistance and Legal Relations in Civil, Family and Criminal Matters" (1993). Furthermore, her husband's requests to thoroughly examine all documents and evidence on file were unreasonably denied by the courts, in violation of article 14, paragraph 1, of the Covenant. She affirms that the court was biased as it assumed Mr. Ismailov's guilt before examining all the evidence, in violation of article 26 of the Constitution and article 22 and 23 of the Code of Criminal Procedure.

3.4 The author claims that the pre-trial investigation and the trial itself were conducted with important breaches of procedural norms and of Mr. Ismailov's constitutional and procedural rights. During the pre-trial investigation, her husband was subjected to psychological pressure, in violation of article 26 of the Constitution, article 17 and article 88 of the Criminal Procedure Code, and, as a result, he was compelled to confess guilt. While Mr. Ismailov was in detention, NSS agents conducted five searches in his and his close relatives' apartments, none of which were authorized by a prosecutor, and exerted psychological pressure on them. The author claims that NSS agents searched lawfully her car and decided it was not related to the criminal case against her husband. Thereafter, however, they seized the car and told the author that it would be returned if her husband confessed that he was spying for a foreign country and revealed his code name. Furthermore, NSS agents attempted to prevent the departure of her husband's sister to America for permanent residence, threatening her with opening a criminal case against her and with confiscation of her apartment and car if her brother did not confess guilt. Thus, the author claims that her husband confessed guilt in order to stop the pressure on his family⁴.

⁴ It transpires from the documents on file that these allegations of psychological pressure on Mr. Ismailov and his family members were raised in the trial court, the cassation appeal of 5 February 2007 and the complaint lodged with the General Prosecutor's Office of Uzbekistan on 3 April 2007. The judgments handed down by the Military Court of Uzbekistan (first instance court) and the Judicial Chamber of the Military Court that heard the cassation appeal did not deal in substance with

During the proceedings her husband changed his initial deposition that had been obtained by way of psychological pressure. Nevertheless, according to the judgment of 26 January 2006, the court considered Mr. Ismailov's allegation of psychological pressure as unfounded and unconvincing and decided that the self-incriminating testimony given at the time of pre-trial investigation could be used as a basis for his sentence. Thus, the judgment is based solely on his false confession, in breach of articles 26, 455 and 463 of the Code of Criminal Procedure. The author submits that, with the exception of her husband's self-incriminating testimony, the court did not present any other evidence in support of his guilt. These facts constitute a violation of her husband's rights under article 14, paragraph 3 (g), and article 17, paragraph 1, of the Covenant.

3.5 The author claims that the above-mentioned facts as well as other violations of criminal procedure laws that were admitted during the pre-trial investigation and in court led to the trial being biased and violated her husband's right to defence and to a fair trial.

State party's observations on admissibility and merits

4. In a note verbale of 16 February 2009, the State party points to the groundlessness of the author's allegations as regards the alleged violations admitted during the criminal investigation and the alleged victim's trial. It submits that in 2005, Mr. Ismailov, abusing his position as a civil servant in the Ministry of Defence of Uzbekistan Republic, was engaged in unauthorized disclosure of State secrets to representatives of a diplomatic mission of a foreign country, thereby putting at risk the interests of national security of Uzbekistan. It further submits that Mr. Ismailov was charged with offences under article 157, paragraph 1 (treason), article 248, paragraph 1 (illegal ammunition storage), and article 301, paragraph 1 (abuse of power) of the Uzbek Criminal Code. On 26 January 2006, the Military Court of the Uzbek Republic found him guilty of the above-mentioned criminal offences and, after the application of the Senate of Oliy Majlis'⁵ Decree of 2 December 2005 "On amnesty on the occasion of the 13th anniversary of the Constitution of Uzbek Republic", sentenced him to 15 years of imprisonment. Further consideration of the author's case by the investigation bodies and the Military Court as well as its examination within cassation proceedings did not reveal any violation of the law and of Mr. Ismailov's rights during the pre-trial investigation or the trial.

Authors' comments on the State party's observations

5.1 On 20 February 2009, the author submitted her comments on the State party's observations on admissibility and merits. She reiterates her allegation that the investigation and the trial of her husband have been conducted in violation of national legislation and of his constitutional rights as well as of international norms. The Uzbek authorities have not presented any sound and motivated answer to the claims raised in her numerous complaints, namely: (1) on the late presentation of charges; (2) on the refusal to allow her husband to have assistance of a lawyer of his own choosing as well as on the conduct of investigation actions (interrogations, confrontations etc.) in the absence of the lawyer assigned to the case by the investigating officer; (3) on the psychological pressure to which Mr. Ismailov and his family were exposed by blackmail, deceit and numerous home searches; (4) on the court's unreasonable and groundless refusal to call and examine the defence witnesses; (5) on the violation of criminal procedure legislation in relation to the evaluation of evidence in her husband's case as well as on the imposition of a sentence based solely on self-

the claim before dismissing it. It seems that the Prosecutor did not address the substance of the claim either.

⁵ The Senate of Oliy Majlis is the Upper Chamber of the Uzbek Parliament.

incrimination. The author recalls that all these allegations have been reflected in her original submission to the Committee.

5.2 The author submits that the State party failed to address in its observations the question of admissibility and merits of her communication under the Optional Protocol. She contends that her husband's persecution by the non-application of the annual amnesty laws is an indication of the State party's intention to delay his release from prison.

5.3 By letter dated 15 April 2010, the author submits that the persecution of her husband continues through the non-application of annual amnesty laws, ongoing psychological and physical pressure, denial of access to qualified medical aid and worsening of his imprisonment conditions. On 24 March 2010 Mr. Ismailov was transferred from the Bekabad prison Uya 64/21 to the Tashkent prison and, on 9 April 2010, to the colony of strict regime Uya 64/71 in Zhaslyk city (Karakalpakstan). The transfer confirms the authorities' intention to worsen his conditions of imprisonment.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement. With respect to the requirement of exhaustion of domestic remedies, the Committee notes the various complaints and appeals filed by Mr. Ismailov. It also notes that the State party has not challenged the admissibility of the present communication on such grounds. Accordingly, the Committee considers that the requirement of article 5, paragraph 2 (b), of the Optional Protocol has been met.

6.3 With respect to the author's allegation that the home searches conducted without the authorization of the prosecutor constitute a violation of article 17, paragraph 1, of the Covenant, the Committee observes that the author has not provided sufficient information to substantiate this claim, including information on whether this allegation was brought before the judicial authorities. Accordingly, the Committee considers this claim inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

6.4 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, her claims under articles 9, paragraphs 2 and 3; and article 14, paragraphs 1 and 3 (b), (d), (e) and (g), of the Covenant, and therefore proceeds to their examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information received from the parties, in accordance with article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not provided any information related to the substance of the communication, and has not addressed in detail the specific violations alleged to have occurred. In the absence of any pertinent information from the State party on the substance of the author's claims, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.

7.2 The Committee takes note of the author's claim that, on 29 June 2005, her husband was arrested and taken to the pre-trial detention facility of the National Security Service without being informed of any charges against him. It was only on 1 July 2005 that he was

informed of criminal charges. The Committee recalls that article 9, paragraph 2, requires that anyone arrested shall be informed at the time of arrest of the reasons of arrest and of any charges. In the absence of any observation by the State party regarding the author's allegations, the Committee considers that the facts, as submitted, reveal a violation of this provision.⁶

7.3 The Committee notes the author's claim that, after her husband's arrest on 29 June 2005, his remand into detention was authorized by the Deputy General Prosecutor of the Military Prosecutor's Office of Uzbekistan in violation of article 9, paragraph 3, of the Covenant. The Committee recalls its established jurisprudence⁷ 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 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 the facts as submitted reveal a violation of this provision.

7.4 The Committee takes note of the author's allegations that her husband's rights under article 14, paragraph 3 (b) and (d) were violated, as he was not provided with a lawyer during the interrogation and his right to have the assistance of the lawyer of his own choosing was denied by the investigator, who assigned another lawyer to the case. The Committee further notes the author's claims that the lawyer assigned met her husband only twice and that, although the investigation actions were carried out in his absence, he signed all the interrogation reports at the end of the criminal investigation. The Committee recalls that subparagraph 3 (b) of article 14 provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms⁸. It further recalls that the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing, or to have legal assistance assigned to them free of charge whenever the interests of justice so require, is provided for by article 14, paragraph 3 (d). The Committee stresses that the counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused, and that, in certain cases, the counsel's misbehavior or incompetence may entail the responsibility of the State concerned of a violation of article 14, paragraph 3 (d)⁹. In the absence of any observations from the State party, the Committee concludes that the denial of access to a lawyer of choice until the trial stage constitutes a violation of Mr. Ismailov's rights under article 14, paragraph 3 (b) and (d), of the Covenant.

7.5 The author claims that her husband had no opportunity to obtain the attendance and examination of important witnesses on his behalf, as the court refused to summon them. The Committee recalls that, as an application of the principle of equality of arms, the

⁶ Communication No. 1348/2005, *Ashurov v. Tajikistan*, Views adopted on 20 March 2007, paragraph 6.4.

⁷ See, inter alia, communication No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, paragraph 11.3; communication No. 1218/2003, *Platonov v. Russian Federation*, Views adopted on 1 November 2005, paragraph 7.2; communication No. 1348/2005, *Rozik Ashurov v. Tajikistan*, Views adopted on 20 March 2007, paragraph 6.5.

⁸ Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPR/C/GC/32 (2007), paragraph 32.

⁹ *Ibid.*, paragraphs 37 and 38.

guarantee laid down in article 14, paragraph 3 (e) is important to ensure an effective defence by the accused and their counsel and guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution¹⁰. In the absence of any information from the State party as to the reasons for the refusal to allow the presence and examination of defence witnesses, the Committee concludes that the facts as presented by the author amount to a violation of Mr. Ismailov's right under article 14, paragraph 3 (e), of the Covenant.

7.6 The Committee notes the author's claim that her husband was subjected to psychological pressure and that he confessed guilt in order to stop the persecution and psychological attacks upon his family by the NSS agents. It further observes that these allegations were raised both at the trial and cassation proceedings and were dismissed by the Military Court and the Judicial Chamber of the Military Court without the substance of the claim being dealt with. It also seems that the Prosecutor did not address the substance of the claim when it dismissed the complaint of 3 April 2007. The State party has not commented on these allegations. The Committee also notes the author's assertion that, although her husband retracted his self-incriminating deposition during the court proceedings, the court ignored this fact and handed down a judgment based solely on his false confession obtained through psychological pressure. The Committee recalls that the safeguard laid down in article 14, paragraph 3 (g), of the Covenant must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt¹¹. In the absence of any observations from the State party in this respect, the Committee concludes that the facts, as submitted by the author, disclose a violation of Mr. Ismailov's right under article 14, paragraph 3 (g), of the Covenant.

7.7 Having come to a conclusion in the previous paragraphs, the Committee does not consider it necessary to address the possible violation of article 14, paragraph 1, of the Covenant.

8. 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. Ismailov's rights under article 9, paragraphs 2 and 3; and article 14, paragraph 3 (b), (d), (e), and (g), of the Covenant.

9. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to consider a retrial in compliance with all guarantees enshrined in the Covenant, or release, as well as appropriate reparation, including compensation. The State party is also under an obligation to take steps to prevent similar violations 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 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 remedy when

¹⁰ Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPR/C/GC/32 (2007), paragraph 39.

¹¹ *Ibid.*, para. 41. See also communication No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, paragraph 11.7; communication No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, paragraph 7.4; communication No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, paragraph 5.1.

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. In addition, the State party is 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.]
