

**International Covenant on
Civil and Political Rights**Distr.: General
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Human Rights Committee**Communication No. 1592/2007****Views adopted by the Committee at its 108th session
(8–26 July 2013)**

<i>Submitted by:</i>	Olga Pichugina (represented by counsel, Roman Kisliak)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	20 July 2007 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 October 2007 (not issued in a document form)
<i>Date of adoption of Views:</i>	17 July 2013
<i>Subject matter:</i>	Habeas corpus; unfair trial
<i>Substantive issues:</i>	Right to be brought promptly before a judge; unfair trial
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of a claim
<i>Articles of the Covenant:</i>	2; 9, paragraph 3; and 14, paragraph 1
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)



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 (108th session)

concerning

Communication No. 1592/2007*

Submitted by: Olga Pichugina (represented by counsel, Roman Kisliak)

Alleged victim: The author

State party: Belarus

Date of communication: 20 July 2007 (initial submission)

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

Meeting on 17 July 2013,

Having concluded its consideration of communication No. 1592/2007, submitted to the Human Rights Committee by Olga Pichugina under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Olga Pichugina, a Polish national born in 1962. She claims to be a victim of violations by Belarus of her rights under articles 2; 9, paragraph 3; and 14, paragraph 1, of the International Covenant on Civil and Political Rights.¹ The author is represented by counsel.

The facts as presented by the author

2.1 On 20 April 2002, the author was travelling by train from Moscow to Warsaw. At 6.30 a.m. her train stopped in Brest, Belarus, where she was arrested on suspicion of having committed a crime under article 228 of the Criminal Code (smuggling of a restricted

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Khesoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for the State party on 30 December 1992.

currency in a large amount), and was placed in the investigation detention facility of the Internal Security Department of the Brest Region. On 22 April 2002, an investigator of the Committee of State Security issued an order to have the author kept in custody, which was sanctioned by the Brest Regional Prosecutor's Office in conformity with article 119, paragraph 2, and article 126, paragraph 4, of the Criminal Procedure Code. On the same date, she was brought to the investigation detention facility of the Directorate of the Committee of State Security, and then, shortly thereafter, to the investigation detention facility SIZO No. 7 in Brest. She remained in custody until 30 April 2002, when she was released. During her 10 days of detention, the author was not brought before a judge, as required by article 9, paragraph 3, of the Covenant.

2.2 At the time, the author did not take any legal steps to challenge the failure of Belarusian authorities to bring her before a judge. She claims that the Criminal Procedure Code of Belarus does not recognize any right that is analogous to article 9, paragraph 3, of the Covenant. At the same time, however, article 1, paragraph 4, of the Criminal Procedure Code provides that "International treaties of the Republic of Belarus that define rights and freedoms of individuals and citizens shall apply in criminal proceedings along with the present Code".

2.3 On 26 April 2007, i.e. five years after the events described above, the author complained both to the Head and the Chief of the Directorate of the Committee of State Security about the failure of the relevant authorities to bring her promptly before a judge, in accordance with article 9, paragraph 3, of the Covenant. On 14 May 2007, she received a response from both officials, dated 4 May and 5 May 2007, respectively, stating that there had been no violation of her rights under article 9, paragraph 3, that the decision of the Committee's investigator had been taken in conformity with the Belarusian law in force and that she had not exercised her right to appeal before a court the decision to detain her in accordance with article 144 of the Criminal Procedure Code. In addition, the Chief of the Committee's Directorate pointed out that the legislation in force at the time did not prescribe that anyone arrested or detained on a criminal charge be brought promptly before a judge.

2.4 On 26 April 2007, the author also complained about the Brest customs officers' failure to act, invoking article 9, paragraph 3, of the Covenant, to the Chairman of the Belarus State Customs Committee and to the Head of the Brest Customs. On 11 May 2007, she received a reply from the Deputy Chairman of the Belarus State Customs Committee, informing her that her detention had been carried out in conformity with the Belarus law in force. On 11 May 2007, she received a letter dated 5 May 2007, from the Head of the Brest Customs, who also did not find any grounds to consider that the actions of the Brest Customs, i.e., not bringing her promptly before a judge, had been unlawful.

2.5 The author states that she had no right to appeal the above decisions, because under article 138 of the Criminal Procedure Code, it is only "actions and decisions" of State organs that can be appealed, whereas "omission to act" cannot be appealed. In other words, there was no positive action taken by a government official against which an appeal could be lodged. As to the fact that she had not exercised her right to appeal to a court the decision to detain her, the author submits that, in her view, a right of appeal refers to article 9, paragraph 4, of the Covenant, and not to article 9, paragraph 3.

2.6 On 25 May 2007, the author invited the Leninsky District Court to open a civil case about the failure of the authorities to have her brought promptly before a judge. On 31 May 2007, the Leninsky District Court rejected her request explaining that her claims "were related to the actions carried out by investigation and inquiry bodies in the framework of criminal proceedings. These actions should be appealed to court according to the procedure stipulated in Chapter 16 (articles 138–147) of the Criminal Procedure Code, and, therefore cannot be appealed within the civil proceedings as stipulated in article 353 of the Civil

Procedure Code, as the law prescribes another procedure for its appeal.” The author claims that the exception to the right to appeal unlawful actions of State authorities established by article 353 of the Civil Procedure Code applies only when the Belarus law “establishes another, non-judicial, procedure for the consideration of particular complaints”. The procedure stipulated in Chapter 16 of the Criminal Procedure Code, referred to by the Leninsky District Court, does not fall within the above category. Moreover, under paragraph 1, part 2, of the Ruling No. 10 of the Plenary of the Belarus Supreme Court of 10 December 2002, “under article 60 of the Belarus Constitution, an appeal according to non-judicial procedure of the State bodies’ actions (omission to act), stipulated in article 353 of the Civil Procedure Code, does not deprive citizens from applying to court when they disagree with the adopted decision”. On 15 June 2007, the author appealed the decision of the Leninsky District Court to the Brest Regional Court on the above-mentioned grounds. Her appeal was dismissed on 16 July 2007, inter alia, on the grounds that she could have complained about the acts or omissions within the criminal proceedings of the investigative institutions to the responsible prosecutor.

2.7 The author refers to the Committee’s general comment No. 8 (1982) on the right to liberty and security of persons,² where the Committee noted that the right to be brought promptly before a judge means that the delay “must not exceed a few days”. She also refers to the Views in communication No. 852/1999, *Borisenko v. Hungary*,³ where the Committee considered a detention which lasted three days before having a detainee brought to a judicial officer too long and not fulfilling the requirement of “promptness”, as provided under article 9, paragraph 3, of the Covenant, except when there are solid reasons for the delay. She further refers to communication No. 521/1992, *Kulomin v. Hungary*,⁴ where the Committee considered that a prosecutor could not be considered a judicial officer for the purpose of article 9, paragraph 3.

The complaint

3.1 The author claims a violation by the State party of her rights under article 9, paragraph 3, of the Covenant, because she was not brought promptly before a judge during her detention from 20 April to 30 April 2002.

3.2 She further claims a violation of her rights under article 14, paragraph 1, of the Covenant, as with the decision of 31 May 2007 of the Leninsky District Court she was denied the protection of her rights by a competent, independent and impartial tribunal.

3.3 Finally, she claims a violation of article 2 of the Covenant in general terms and without providing any detailed explanations or argumentation thereon.

State party’s observations on admissibility and merits

4.1 On 2 May 2008, the State party submitted its observations on the admissibility and merits of the communication. It explains that the author was arrested as a suspect by a senior inspector of the Brest Customs on 20 April 2002. On 22 April 2002, an inspector of the Investigation Committee of the Brest Region’s Department of the Committee of State Security decided to place her in custody. Also on 22 April 2002, a Deputy Prosecutor of Brest approved the author’s placement in custody. The author was released on 30 April 2002. On 27 September 2002, the author was found guilty by the Leninsky District Court of Brest of having committed a crime under article 14 (1) (attempt to commit a crime), and

² *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V, para. 2.*

³ Communication No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002, para. 7.4.

⁴ Communication No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3.

article 228 (smuggling of a restricted currency in a large amount) of the Criminal Code and ordered the confiscation of the amount of money in question (50,000 USD). This decision was confirmed by the Brest Regional Court on 22 October 2002. The State party notes that the court's decisions were grounded and the author's guilt in the crime was confirmed by a multitude of corroborating evidence, including witnesses' testimonies and the author's own explanations to the effect that she did not want to declare the 50,000 US dollars, but declared a few hundred Polish zloti as the only money she carried, because she feared for her life during the trip.

4.2 The State party further submits that the author was detained in accordance with articles 107 (apprehension); 108 (apprehension of a suspect); 110 (procedure of apprehension); 114 (release); 115–119 (notification of apprehension and measures of restraint); 126 (detention) and 127 (time limits of detention) of the Criminal Procedure Code.

4.3 The State party also notes that, on 31 May 2007, the Leninsky District Court of Brest refused to initiate civil proceedings in relation to the author's complaint regarding the failure of the authorities to bring her promptly before a judge, as such complaint was not subject to examination within civil proceedings. This decision was upheld by the Brest Regional Court on 16 July 2007. The State party notes that these decisions were grounded and lawful, for the following reasons: under article 353 of the Civil Procedure Code, a citizen can complain about unlawful acts or omissions of, *inter alia*, State authorities, unless, according to the Belarusian law, there is another, non-judicial procedure for the consideration of particular complaints. Under article 139 of the Criminal Procedure Code, individuals listed in article 138 of this Code can complain to the prosecutor in charge of monitoring the investigation about acts and decisions adopted during the pretrial investigation of, *inter alia*, investigative authorities. Consequently, the national courts had correctly concluded that the author's complaint could not have been examined in the framework of civil proceedings.

4.4 Furthermore, the State party notes that, apart from the rights under article 9, paragraph 3, of the Covenant, article 9 of the Covenant guarantees other interrelated rights. Article 9, paragraph 1, guarantees that no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. While article 9, paragraph 4, of the Covenant guarantees that anyone deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that this court may decide without delay on the lawfulness of this detention and order his/her release if the detention is not lawful.

4.5 In this connection, the State party points out that, in line with the rights guaranteed by article 9 of the Covenant, the lawfulness of the apprehension and the measure of restraint chosen to be applied to the author – detention on remand – according to domestic laws, is subjected to judicial control. Pursuant to article 144 of the Criminal Procedure Code,⁵ the lawfulness of an apprehension is determined within 24 hours, while the lawfulness of detention on remand, within 72 hours. Consequently, since the author did not avail herself of the mentioned opportunity to have the lawfulness of her detention determined, her complaint about the lack of judicial control is unfounded.

4.6 The State party notes that, given the nature of the author's complaint (failure to bring her promptly before a judge), such complaint was subjected to examination in the context of criminal law. Therefore, the author's claim that the civil court unlawfully refused

⁵ Article 144 of the Criminal Procedure Code: "Judicial control over lawfulness and justification of apprehension, detention on remand, house arrest or extension of period of detention on remand and house arrest".

to examine her complaint within civil proceedings is ill-founded and does not demonstrate that she was denied access to justice.

4.7 Finally, as to the author's claim that, according to domestic legislation, she could not have complained about the omissions/inaction of officials, the State party maintains that these author's assertions are also unfounded. The State party notes that the author has not availed herself of the opportunity prescribed by article 144 of the Criminal Procedure Code to challenge the lawfulness of her apprehension and detention on remand before the courts.

Author's comments on the State party's observations

5.1 On 4 July 2008, the author reiterates that, during her detention from 20 April to 30 April 2002, the national authorities failed to bring her before a judge, in violation of article 9, paragraph 3, of the Covenant.

5.2 She further notes the discrepancies in the State party's observations. She notes that, on the one hand, the State party contends that she had no right to complain in court regarding her right under article 9, paragraph 3, and the need to complain before a prosecutor in this connection. On the other hand, she notes that the State party underlined that, pursuant to article 144 of the Criminal Procedure Code, a court could exercise judicial control over the lawfulness of the apprehension or detention on remand, in conformity with article 9, paragraph 4, of the Covenant. In this connection, the author maintains that neither a complaint to the prosecutor responsible of the monitoring of the criminal case, nor a request for judicial control over the lawfulness of her detention, were an effective remedy in the present case, for purposes of article 9, paragraph 3, of the Covenant. She notes that, in another complaint against Belarus concerning also a violation of article 9, paragraph 3, of the Covenant, submitting a complaint to the Prosecutor's Office concerning the failure of the national authorities to bring the individual promptly before a judge did not bring any relief to the victim. Further, as to the possibility to complain in court under article 144 of the Criminal Procedure Code, the author notes that the mentioned opportunity does not ensure that an individual apprehended and detained in the framework of criminal proceedings is promptly brought before a judge as prescribed by article 9, paragraph 3, of the Covenant. Therefore, she did not avail herself of the mentioned possibility to complain about her detention.

5.3 The author points out that the State party erroneously interprets the rights guaranteed under article 9, paragraph 3, of the Covenant as part of the guarantees contained in article 9, paragraph 4, of the Covenant. She stresses that the right under article 9, paragraph 3, of the Covenant to be promptly brought before a judge is a right independent of the one under article 9, paragraph 4, of the Covenant (to appeal to a court a decision of detention). The fact that the author did not avail herself of the opportunity under article 9, paragraph 4, of the Covenant (i.e. to appeal under article 144 of the Criminal Procedure Code) should not eliminate the enjoyment of her rights under article 9, paragraph 3, of the Covenant (to be promptly brought before a judge after her apprehension).

5.4 As to the State party's argument that she was apprehended and detained in accordance with articles 107; 108; 110; 114; 115–119; 126 and 127 of the Criminal Procedure Code, the author points out that none of these articles contains guarantees similar to the one guaranteed under article 9, paragraph 3, of the Covenant. Moreover, article 144 of the Criminal Procedure Code in no way guarantees for those apprehended or detained in criminal cases the right under article 9, paragraph 3, of the Covenant to be brought promptly before a judge.

5.5 As to the alleged violation of her rights under article 14, paragraph 1, of the Covenant, the author reiterates that, through its ruling of 31 May 2007, the Leninsky District Court committed a denial of justice and denied her the protection of her rights by a

competent, independent and impartial tribunal. She adds that the judiciary in the State party is not independent and impartial and is subjected to the control of the executive branch, which renders futile complaints regarding actions or omissions of the representatives of the executive power.

5.6 Finally, on the issue that she had never requested that the national authorities bring her promptly before a judge, the author emphasizes that, in any event, the fact is that she, as a person in custody as part of criminal proceedings, was never brought promptly before a judge, in violation to article 9, paragraph 3, of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case 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 another procedure of international investigation or settlement.

6.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author has not appealed against her detention from 20 April to 30 April 2002 pursuant to the procedure established by article 144 of the Criminal Procedure Code. The Committee further notes, however, that, in essence, the author's claim relates not to the right guaranteed under article 9, paragraph 4, of the Covenant to bring proceedings before a court, but to her right under article 9, paragraph 3, of the Covenant, to be brought promptly before a judge following her apprehension, without having to request it, and observes that she conveyed her arguments in this respect to the State party's authorities by lodging complaints with the Committee of State Security, the State party's customs authorities, the Leninsky District Court of Brest and the Leninsky Regional Court (see paras 2.3–2.6 above). In addition, the Committee notes that the State party has not provided any information to demonstrate the effectiveness of filing a complaint with the Prosecutor's Office about such a failure of State authorities to bring an individual promptly before a judge following an apprehension. In this connection, the Committee notes that the author's examples regarding other cases where individuals had complained in vain to a prosecutor with similar claims remained unrefuted by the State party. In the circumstances, the Committee considers that it is not precluded, by the requirements of article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

6.4 As to the alleged violation of the author's right under article 2 and article 14, paragraph 1, of the Covenant, the Committee considers that these claims have been insufficiently substantiated, for purposes of admissibility. In the absence of any further pertinent information on file, the Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, her remaining claim raising issues under article 9, paragraph 3, of the Covenant. It declares this claim admissible regarding this provision of the Covenant and proceeds to its examination on the merits.

Consideration of the merits

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

7.2 The Committee notes the author's claim that her rights were violated because, from 20 April to 30 April 2002, i.e. from the moment of her actual apprehension until the moment of her release, she was never brought before a judge, in spite of the requirements of article 9, paragraph 3, of the Covenant that a person is brought before a judge promptly from the moment of actual detention.

7.3 In this regard, the Committee recalls that detention before trial should be an exception and should be as short as possible.⁶ To ensure that this limitation is observed, article 9 requires that the detention be brought promptly under judicial control.⁷ Prompt initiation of judicial oversight also constitutes an important safeguard against the risk of ill-treatment of the detained person. This judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person.⁸ The period for evaluating promptness begins at the time of arrest and not at the time when the person arrives in a place of detention.⁹

7.4 While the meaning of the term "promptly" in article 9, paragraph 3, of the Covenant must be determined on a case-by-case basis,¹⁰ the Committee recalls its general comment No. 8 (1982) on the right to liberty and security of persons¹¹ and its case law,¹² pursuant to which delays should not exceed a few days. The Committee further recalls that it has recommended on numerous occasions, in the context of consideration of the States parties' reports submitted under article 40 of the Covenant, that the period of police custody before a detained person is brought before a judge should not exceed 48 hours.¹³ Any longer period of delay would require special justification to be compatible with article 9, paragraph 3, of the Covenant.¹⁴

7.5 In the present case, the Committee notes that the State party has failed to provide any explanation as to the necessity of detaining the author from 20 April to 30 April 2002, without bringing her before a judge, other than the fact that she did not initiate a complaint. The Committee recalls that the inactivity of a detained person is not a valid reason to delay bringing her before a judge. In the circumstances of the present communication, the

⁶ General comment No. 8 (1982) on the right to liberty and security of persons, para. 3.

⁷ See, for example, communication No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.2.

⁸ See communication No. 1787/2008, *Zhanna Kovsh (Abramova) v. Belarus*, Views adopted on 27 March 2013, para. 7.3.

⁹ See, for example, communication No. 613/1995, *Leehong v. Jamaica*, Views adopted on 13 July 1999, para. 9.5.

¹⁰ See, for example, communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, para. 5.6

¹¹ General comment No. 8 (1982) on the right to liberty and security of persons, para. 2.

¹² See, for example, *Borisenko v. Hungary*, para. 7.4; communication No. 625/1999, *Freemantle v. Jamaica*, Views adopted on 24 March 2000, para. 7.4; communication No. 277/1988, *Teran Jijon v. Ecuador*, Views adopted on 26 March 1992, para. 5.3; and communication No. 911/2000, *Nazarov v. Uzbekistan*, Views adopted on 6 July 2004, para. 6.2.

¹³ See, for example, concluding observations on Kuwait, CCPR/CO/69/KWT, para. 12; concluding observations on Zimbabwe, CCPR/C/79/Add.89, para. 17; concluding observations on El Salvador, CCPR/C/SLV/CO/6, para. 14; concluding observations on Gabon, CCPR/CO/70/GAB, para. 13.

¹⁴ See, *Borisenko v. Hungary*, para. 7.4. See also, Basic Principles on the Role of Lawyers, principle 7.

Committee considers that the detentions of the author were incompatible with article 9, paragraph 3, of the Covenant.¹⁵

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 State party has violated the author's rights under article 9, paragraph 3, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of any legal costs incurred by her, as well as adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation, in particular the Criminal Procedure Code, to ensure its conformity with the requirements of article 9, paragraph 3, of the Covenant.

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 and enforceable 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 to have them widely disseminated in Belarusian and Russian in the State party.

[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.]

¹⁵ See also communication No. 1787/2008, *Zhanna Kovsh (Abramova) v. Belarus*, paras. 7.3–7.5.