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Human Rights Committee

Communication No. 1873/2009

Views adopted by the Committee at its 109th session (14 October – 1 November 2013)

Submitted by:	Nikolai Alekseev (not represented by counsel)
Alleged victim:	The author
State party:	The Russian Federation
Date of communication:	25 March 2009 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 28 April 2009 (not issued in a document form)
Date of adoption of Views:	25 October 2013
Subject matter:	Right to peaceful assembly.
Substantive issue:	Unjustified restrictions to the right of peaceful assembly.
Procedural issues:	The same matter already being examined under another procedure of international investigation or settlement; exhaustion of domestic remedies; level of substantiation of claims.
Article of the Covenant:	21.
Articles of the Optional Protocol:	2; 5, paragraphs 2 (a) and (b).
	[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 (109th session)

concerning

Communication No. 1873/2009*

Submitted by:	Nikolai Alekseev (not represented by counsel)
Alleged victim:	The author
State party:	The Russian Federation
Date of communication:	25 March 2009 (initial submission)

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

Meeting on 25 October 2013,

Having concluded its consideration of communication No. 1873/2009, submitted to the Human Rights Committee by Mr Nikolai Alekseev 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 Mr Nikolai Alekseev, a Russian national born in 1977. He claims to be a victim of violation by the Russian Federation of his rights under article 21 of the International Covenant on Civil and Political Rights.[1] The author is not represented by counsel.

The facts as presented by the author

2.1 The author is a homosexual and a human rights activist. From 2006 to 2008, together with other activists, he tried to organise a number of peaceful assemblies (Gay Prides) in Moscow, which were all banned by the municipal authorities.

* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr, Yuji Iwasava, Mr. Walter Kalin, Ms. Zonke Zanele Majodina, Mr. Kheshoe 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 1 January 1992.

2.2 On 11 July 2008, the author together with two other activists submitted a request to the Prefect of the Central Administrative District of Moscow, for a stationary meeting – a picket, in front of the Iranian Embassy in Moscow. The purpose of the gathering was to express concern over the execution of homosexuals and minors in Iran, and to call for a ban on such executions. The author informed the authorities of the purpose, date, time and place of the event, which was scheduled to take place from 1p.m. to 2 p.m. on 19 July 2008 in front of the Embassy, and which would involve no more than 30 participants.

2.3 On the same date, the Deputy Prefect of the Central Administrative District of Moscow refused to authorise the event, considering that the aim of the picket would trigger "a negative reaction in society" and it could lead to "group violations of public order which can be dangerous to its participants".

2.4 On 16 July 2008, the author filed a complaint against this refusal to the Tagansky District Court of Moscow. He argued that the Russian law does not permit a blanket ban on conducting a peaceful assembly, as long as the assembly's purpose is in conformity with constitutional values. He added that if the Prefecture had any serious grounds to believe that the proposed picket would trigger mass riots, they should have arranged the police protection to participants of the assembly, sufficient to secure the exercise of their constitutional right to peaceful assembly.

2.5 On 18 September 2008, the Tagansky District Court rejected the complaint and endorsed the municipal authority's argument that it was impossible to ensure security of the participants of the event and avoid riots, as the proposed event would provoke a strong public reaction. In the court's opinion, the decision of 11 July 2008 was in conformity with both the national law and the provisions of the European Convention on Human Rights. On 5 October 2008, the author appealed the judgement to the Moscow City Court on cassation proceedings, but his appeal was rejected on 18 December 2008.

The complaint

3. The author claims that the State party has violated his right to peaceful assembly as protected by article 21 of the Covenant, as it imposed a blanket prohibition on the meeting he intended to organise. The authorities' refusal was imposed neither "in conformity with the law" nor was it "necessary in a democratic society". In particular, the national law clearly requires from the authorities to take the necessary measures to ensure the security of the participants in an assembly and to secure its peaceful conduct. Moreover, the restriction imposed was not "necessary in a democratic society" and did not pursue any of the legitimate aims mentioned in article 21 of the Covenant. The authorities' refusal to propose an alternative location for the mass event in question and their assertion that they could not provide sufficient police force to protect the participants, demonstrate that the authorities' real aim was to prevent the gay and lesbian minority in Russia from becoming visible to the public and from attracting public attention to their concerns. Finally, the fact that a minority group's ideas might "offend, shock or disturb" the majority and might provoke violent opposition cannot justify a blanket ban on such groups' expression of views by means of peaceful assembly. On the contrary, the State party must protect the minority groups' peaceful assemblies against violent acts.

State party's observations on admissibility and merits

4.1 On 29 June 2009, the State party submitted its observations on admissibility and merits. It recalls the facts of the case, and the proceedings engaged by the author. It further notes that the author's claims under article 21 of the Covenant are unfounded as the author was refused permission to hold the picket in order to ensure public order. In this connection, the State party notes that article 21 of the Covenant recognises the right to peaceful assembly, but it may be restricted in conformity with law, in the interests of

national security or public safety, public order, the protection of public health or morals or protection of rights and freedoms of others. Articles 31 and 35 of the Russian Federation's Constitution guarantee the right to peaceful assembly with similar restrictions to those set out in article 21 of the Covenant and which are developed in the Federal Law on Assemblies, Meetings, Demonstrations, Street Processions and Picketing (the Federal Law on Mass Events). According to article 8, para. 1, of the Federal Law on Mass Events, public mass events may be held at any place suitable for the event's aim provided that it would not endanger security of persons participating in the event in question. The State party further notes that on 18 September 2008, the Tagansky District Court of Moscow concluded that in light of the negative public reaction towards such pickets, the authorities would not be able to ensure fully security of persons participating in such a mass event. The State party maintains that the refusal of 11 July 2008 was in line with the international norms and domestic legislation.

4.2 The State party adds that the author has not exhausted all domestic remedies as required by article 5, para. 2 (b), of the Optional Protocol to the Covenant, as according to articles 367; 376 and 377, as well in line with Chapter 41 of the Civil Procedure Code, the author could have sought supervisory review of the national courts' decisions by the Presidium of the Moscow City Court, and thereafter by the Supreme Court.

Author's comments on the State party's observations

5.1 On 9 November 2009, the author noted that the State party has erroneously referred to article 8 of the Federal Law on Mass Events. According to him, this provision guarantees the right to hold a public event at any place suitable for its purposes. However, the restrictions on holding public events are linked to the security considerations at a particular place due to its characteristics, such as a risk of collapse of a building, for example. Nothing in the wording of this article suggests that its aim is to provide for the general restrictions on the right of peaceful assembly due to security considerations as invoked by the State party. Furthermore, the mentioned article in any event should be interpreted in the context, as stated in the preamble of the Federal Law on Mass Events, to ensure 'realisation of the constitutionally mandated right of the citizens of the Russian Federation to peaceful assembly (…), to hold rallies, meetings, processions and picketing'.

5.2 The author submits that if the authorities invoke security consideration when refusing the conduct of a mass event at a place or route proposed by the organiser, they are obliged under article 12 of the Federal Law on Mass Events to suggest an alternative place for the event. A different interpretation i.e. placing the burden of identifying an alternative location on the organisers, would lead to the conclusion that the law in question lacks sufficient clarity and, therefore, the restrictions of the right of freedom of assembly would not be regarded as applied 'in conformity with the law' for purposes of article 21 of the Covenant. According to the author, it is for the authorities to suggest an alternative place for a mass event in case of security concerns regarding the safety of the participants.

5.3 As to the State party's objection regarding the exhaustion of domestic remedies, the author points out that the supervisory review proceedings do not constitute an effective remedy, as they do not ensure re-examination of the merits of a case on appeal by a panel of judges (the Presidium of the Moscow City Court or the Supreme Court). According to article 381 of the Civil Procedure Code such an appeal is considered by a judge of the supervisory review court, who can reject it even without examining the case file materials. Only if the judge finds the presented arguments convincing, s/he may request a case file and, upon his/her discretion, remit the case for consideration to the panel of judges of the supervisory review court. In this connection, the author refers to a similar case, where in 2007 a complainant appealed within supervisory review proceedings a refusal to hold a rally with the aim to call for the tolerance towards sexual minorities, but a judge of the

Supreme Court concluded that the refusal was lawful as it was not possible to ensure the participants' safety and decided not to grant a supervisory review of the case. As his case concerned similar circumstances, the author submits that complaining within the supervisory review proceedings would have been futile and not effective.

5.4 The author also requests the Committee to take into account the European Court of Human Rights jurisprudence regarding the ineffectiveness of the supervisory review proceedings on account of the fact that the grounds for quashing final judgements of lower courts are not clear from the Civil Procedure Code, as well as that this procedure is not directly accessible to complainants. In addition, he also notes the Committee's concerns, after consideration of the sixth periodic report of the Russian Federation under the Covenant, as to the systematic discrimination against individuals on the basis of their sexual orientation in the State party, including prejudices by public officials (CCPR/C/RUS/CO/6, para 27).

5.5 On 2 December 2009, the author submitted additional information. In particular, the author draws attention to the judgment of the European Court of Human Rights in the case *Martynets v. Russia*, wherein the European Court assessed the effectiveness of the supervisory review proceedings in force in the State party since 7 January 2008. It concluded that the supervisory review proceedings in the State party may not be considered as a domestic remedy necessary to exhaust under article 35 of the European Convention on Human Rights before lodging an application before the Court, as the review proceedings in respect of legally binding judgments may be conducted through multiple instances, with an ensuing risk that the case will go back and forth from one instance to another for an indefinite period.[2]

State party's further observations

6.1 On 29 September 2010, the State party reiterates the facts of the case and the proceedings which the author took at the domestic level. It further reiterates that the author's claim under article 21 of the Covenant is unfounded and that similar restrictions for the enjoyment of the right to peaceful assembly as set out in this article are also provided for in article 55 of the Constitution and in article 8 of the Federal Law on Mass Events. It recalls that article 8 of the Federal Law on Mass Events stipulates that a public mass event may be held at any place suitable for the event's aim if it does not endanger the security of the participants. In this connection, it maintains that the decision of the Deputy Prefect of the Central Administrative District of Moscow was based on the consideration of the mentioned security aspect.

6.2 It also reiterates that the author has failed to exhaust available domestic remedies within the supervisory review proceedings and, therefore, the present communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol to the Covenant.

6.3 The State party adds that the author has abused the right to submit a communication, as the same matter is being examined by another procedure of international investigation or settlement. In particular, it draws attention to the fact that on 29 January 2007, 14 February 2008 and 10 March 2009, the author submitted applications to the European Court of Human Rights regarding the refusal by the authorities to hold a mass event ('Gay Pride') and a picket concerning the rights of sexual minorities[3]. In this connection, it submits that the complaints before the European Court and the present one are of similar nature as they have been submitted by the same person, concern the rights of the same specific group of

[2] *Martynets v. Russia*, application No.29612/09, decision of 5 November 2009 as to admissibility.

[3] The mentioned applications have been registered by the European Court under Nos. 4916/07; 25924/08 and 14500/09.

persons (persons belonging to sexual minorities), as well as concern the acts of the same municipal authority.

Author's further comments

7.1 On 1 November 2010, the author informed that on 21 October 2010 the European Court of Human Rights adopted a judgment in his case, *Alekseev v. Russia*, (applications Nos. 4916/07; 25924/08 and 14500/09), which concerns the refusal of the authorities to hold events similar to the ones mentioned in the present communication, in 2006, 2007 and 2008. In this particular case, the European Court found violation of the author's rights under article 11 of the European Convention on Human Rights (right to peaceful assembly).

7.2 On 30 November 2010, the author reiterated that the supervisory review proceedings may not be considered as an effective remedy for purposes of admissibility. As to the State party's argument that the present communication should be viewed as an abuse of the right to complain since a similar matter is being examined by another international procedure, the author submits that the present complaint is based on and concerns different facts. The applications before the European Court of Human Rights concern prohibitions to hold Pride Marches or pickets, proposed by the author as alternatives to a Pride March; while the present complaint concerns the prohibition to hold a picket regarding the execution of homosexuals and minors in Iran. Therefore, the present communication should be declared admissible under article 5 of the Optional Protocol to the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee shall ascertain whether the same matter is not being examined under another procedure of international investigation or settlement. In this regard, the Committee notes the State party's argument that on 29 January 2007, 14 February 2008 and 10 March 2009, the author submitted applications to the European Court of Human Rights regarding refusal by the State authorities to hold mass events and a picket concerning the rights of sexual minorities and that they were registered by the European Court. The State party submits that the complaints before the European Court and the present one are of a similar nature as they have been submitted by the same person, concern the rights of the same specific group of persons (persons belonging to sexual minorities), as well as concern the acts of the same authorities. The Committee further notes the author's explanation that the applications before the European Court of Human Rights concerned different factual circumstances, i.e. the prohibition to hold Pride Marches or pickets in 2006 - 2008, proposed by the author as an alternative to a Pride March; while the present complaint concerns a prohibition to hold a picket regarding the execution of homosexuals and minors in Iran.

8.3 The Committee recalls that the concept of 'the same matter' within the meaning of article 5, paragraph (a), of the Optional Protocol has to be understood as including the same authors, the same facts and the same substantive rights[4]. The Committee notes that it is clear from the available information on the case file that the author's applications to the European Court of Human Rights concern the same person and relate to the same

[4] See, e.g., communication No. 1002/2001 *Wallmann et al. v. Austria*, Views of 1 April 2004, para. 8.4.

substantive rights as those invoked in the present communication. However, the Committee observes that the respective applications before the European Court do not relate to the same facts, i.e., the particular event referred to in the present communication. Consequently, the Committee considers that it is not precluded by article 5, paragraph 2 (a), of the Optional Protocol from examining of the present communication for purposes of admissibility.

8.4 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 failed to exhaust available domestic remedies within the supervisory review proceedings, and that, therefore, the communication is inadmissible. In this connection, the Committee notes that the author appealed to the Moscow City Court, which upheld the lower court's decision. The Committee recalls its case-law, according to which supervisory review proceedings against court decisions which have entered into force constitute an extraordinary remedy, dependent on the discretionary power of a judge or prosecutor,[5] and which, thus, do not need to be exhausted for purposes of admissibility. In the absence of any other pertinent information on file, the Committee considers that in the present case it is not precluded, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.[6]

8.5 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claim under article 21, of the Covenant. It declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2. The first issue before the Committee is whether the State party's authorities' restriction of the author's right to peaceful assembly was permissible under any of the criteria contained in the second sentence of article 21 of the Covenant.

9.3 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is an essential means for the public expression of one's views and opinions and indispensable in a democratic society.[7] It also recalls that the State parties must put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression by means of an assembly.[8] A restriction of the right of peaceful assembly is permissible only if it is (1) in conformity with the law, and (2) necessary in a democratic society in the interests of national security or public safety,

[5] See, inter alia, communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, and No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009.

[6] See, e.g, communication No. 1866/2009, *Chebotareva v. the Russian Federation*, Views adopted on 26 March 2012, para. 8.3.

[7] See communication No. 1948/2010, *Turchenyak et al v. Belarus*, Views adopted on 24 July 2013, para.7.4.

[8] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 23, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V. The Committee notes that the General Comment No. 34, although referring to article 19 of the Covenant, also provides guidance with regard to elements of article 21. See communication No. 1790/2008, *Govsha v. Belarus*, Views adopted 27 July 2012, para. 9.4.

public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

9.4 In the present case, the Committee observes that both the State party and the author agree that the denial of permission to hold a picket from 1 p.m. to 2 p.m. on 19 July 2008 in front of the Iranian Embassy in Moscow was an interference with the author's right of assembly, and that the parties disagree whether it was a permissible restriction.

9.5 The Committee also notes that the State party defends the denial of permission to hold the picket at issue as necessary in the interest of public safety. Although the author contends that the safety rationale was a pretext for denying the permit, the Committee finds it unnecessary to evaluate this factual allegation, because the author's claim under Article 21 can be decided on the assumption that the challenged restriction was motivated by concern for public safety.

9.6 The Committee notes that permission for the author's proposed picket was denied on the sole ground that, due to the subject it addressed, namely advocacy of respect for the human rights of persons belonging to sexual minorities, the picket would provoke a negative reaction that could lead to violations of public order. The denial did not turn on the chosen location, date, time, duration, or manner of the proposed public assembly. Thus the decision of the Deputy Prefect of the Central Administrative District of Moscow of 11 July 2008 amounted to a rejection of the author's right to organise a public assembly addressing the chosen subject, which is one of the most serious interferences with the freedom of peaceful assembly. The Committee notes that the freedom of assembly protects demonstrations promoting ideas that may be regarded as annoying or offensive by others and that in such cases States parties have a duty to protect those participating in a demonstration in the exercise of their rights against violence by others. It also notes that an unspecified and general risk of a violent counter-demonstration or the mere possibility that the authorities would be unable to prevent or neutralize such violence is not sufficient to ban a demonstration.The State party has not provided the Committee with any information in the present case supporting the claim that the "negative reaction" to the author's proposed picket by other members of the public would involve violence or that the police would be unable to prevent if they properly performed their duty. In such circumstances, the obligation of the State party was to protect the author in the exercise of his rights under the Covenant, and not to assist in suppressing them. The Committee therefore concludes that the restriction on the author's rights was not necessary in a democratic society in the interest of public safety, and violated article 21 of the Covenant.

9.7 In light of this conclusion, the Committee decides not to examine the author's additional claim that the denial of permission was not in conformity with the law, on the grounds that national law referred only to safety concerns such as the risk of collapse of a building, and that it obliged the authorities to designate an alternative location for the assembly when they rejected the original application.

10. 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 the author's right under article 21 of the Covenant.

11. 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 adequate compensation and reimbursement of any legal costs paid by the author. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. 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 a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of 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.]