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Human Rights Committee

Communications Nos. 1919-1920/2009

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

Submitted by:	Alexander Protsko and Andrei Tolchin (not represented by counsel)
Alleged victims:	The authors
State party:	Belarus
Date of communications:	22 August 2009 (initial submissions)
Document references:	Special Rapporteur's rule 97 decisions, transmitted to the State party on 24 November 2009 (not issued in a document form)
Date of adoption of Views:	1 November October 2013
Subject matter:	Freedom of expression; freedom of assembly
Substantive issues:	Unjustified restriction of one's right to impart information
Procedural issues:	Exhaustion of domestic remedies;
Articles of the Covenant:	19; 21
Articles of the Optional Protocol:	5, paragraph 2 (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

Communications Nos. 1919-1920/2009*

Submitted by:	Alexander Protsko and Andrei Tolchin (not represented by counsel)
Alleged victims:	The authors
State party:	Belarus
Date of communication:	22 August 2009 (initial submissions)

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

Meeting on 1 November October 2013,

Having concluded its consideration of communications Nos. 1919-1920/2009, submitted to the Human Rights Committee by Mr. Alexander Protsko and Mr. Andrei Tolchin 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

1.1 The authors are Mr. Alexander Protsko, "the first author" (communication No. 1919/2009), and Mr. Andrei Tolchin, "the second author" (communication No. 1920/2009), both Belarusian nationals born in 1953 and 1959, respectively. They claim to be victims of a violation by Belarus of their rights under articles 19 and 21, of the International Covenant on Civil and Political Rights. They are unrepresented. The Optional Protocol entered into force for the State party on 30 September 1992.

1.2 On 1 November 2013, pursuant to rule 94, paragraph 2, of its rules of procedure, the Committee decided to join the two communications for decision in light of their factual and legal similarity.

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

The facts as presented by the authors

2.1 In April 2009, both authors were distributing information leaflets in two different locations in the Gomel Region on upcoming peaceful assemblies to commemorate individuals perished in the Chernobyl accident in April 1986.

Mr. Protsko

2.2 On 22 April 2009, the first author distributed leaflets in the village of Bragin, Gomel Region, regarding a forthcoming peaceful commemoration including laying of wreaths and flowers in the village of Bragin at the monument of Mr. Vassily Ignatenko, who had died during the Chernobyl accident.

2.3 The police arrested Mr. Protsko and made an official record alleging him of having committed an administrative offence under article 23.34, part 1, of the Code of Administrative Offences (liability for breaches of the organisation or carrying out of assemblies, meetings, street rallies, demonstrations, other mass events or picketing). The author points out that article 8 of the Law on Mass Events of 30 December 1997 forbids anyone to prepare or distribute any kind of information materials regarding a planned event prior to obtaining official authorisation regarding the event in question. Given that he was distributing leaflets regarding an unauthorised planned event, the police officers decided that he had breached the rules regarding the organisation of a peaceful assembly. The case was brought to court immediately.

2.4 On the same day, the Braginsk District Court of the Gomel Region found him guilty of breaching article 23.34, part 1, of the Code of Administrative Offences and imposed a fine of 105 000 Belarusian Roubles on him; the court ordered the confiscation of the 600 seized leaflets.

2.5 On 20 May 2009, the Gomel Regional Court rejected the first author's appeal against the district court decision. He further complained to the Supreme Court's Chairman, under the supervisory review proceedings, but his complaint was rejected on 4 August 2009 by a deputy-Chairman of the court. The author notes that he has exhausted all available domestic remedies, without obtaining redress.

Mr. Tolchin

2.6 The second author distributed leaflets on 23 April 2009 in Narovlya city (Gomel Region), regarding a planned peaceful assembly, namely a commemoration in Narovlya city, to lay wreaths and flowers at a monument to remember those who lost their lifes in the Chernobyl accident. The police apprehended the author and drafted a record for a breach of article 23.34, part 1, of the Code of administrative offences as he had distributed leaflets for an unauthorised event. On this basis, on 24 April 2009, the Narovlyansk District Court of the Gomel Region ordered the author's administrative arrest for five days. The author appealed against this decision, but, on 15 May 2009, the Gomel Regional Court rejected his appeal; thus the first-instance court's ruling became final and enforceable.

2.7 With regard to exhaustion of domestic remedies, and referring to the Committee's case-law on the matter, the author contends that supervisory review proceedings within the State party do not constitute an effective remedy. In addition, supervisory review in administrative cases requires the payment of a State tax. Therefore, his subsequent appeal to the Chairman of the Supreme Court under the supervisory proceedings was returned to him without examination, due to the non-payment of a State tax by the author which is required for such supervisory review.

The complaint

3.1 The authors claim that the application of the Law on Mass Events in their cases resulted in an unjustified restriction of their right to impart information regarding a peaceful commemoration as protected under article 19, paragraph 2, and the right to peaceful assembly as protected by article 21, of the Covenant.

3.2 Both authors claim that the courts did not give any explanation on the reasons to have them fined apart from repeating the failure to comply with the statutory obligation to receive the authorisation of a gathering prior to the distribution of leaflets. The appeal courts adopted their decisions without assessing their acts in light of the Covenant, despite the authors' specific request. The authors maintain that the restriction in question was necessary neither for the respect of the rights or reputations of others, nor for the protection of national security or of public order (ordre public), or of public health or morals, for purposes of article 19, paragraph 3, of the Covenant. Thus, according to them, they are victims of a violation of their rights under articles 19, paragraph 2 and article 21, of the Covenant.

State party's observations on the admissibility and the merits

4.1 By two notes verbales of 25 January 2010, the State party provided its observations on the admissibility and the merits of the communications. It explains that both authors have been found guilty for having distributed leaflets regarding a commemoration, on 22 and 23 April 2009, respectively, without having obtained the required prior authorisation from the authorities, in violation of the law. Both authors were apprehended by the police and were issued official records for breach of the Code on Administrative Offences.

4.2 On 22 April 2009, the Braginsk District Court of the Gomel Region found Mr Protsko guilty of a breach of article 23.34, paragraph 1, of the Code of Administrative Offences regulating the organisation or conduct of mass events or picketing and fined him to 105 000 Belarusian roubles. This decision was confirmed on appeal, on 20 May 2009, by the Gomel Regional Court. On 4 August 2009, Mr. Protsko's appeal under the supervisory review proceedings was rejected by a deputy Chairperson of the Supreme Court.

4.3 On 24 April 2009, the Narovlyansk District Court of the Gomel Region found Mr. Tolchin guilty of a breach of article 23.34, paragraph 1, of the Code of Administrative Offences, and sentenced him to five days of administrative arrest. This decision was confirmed on appeal, on 15 May 2009, by the Gomel Regional Court. On 14 July 2009, Mr. Tolchin's appeal under the supervisory review proceedings was returned to him by the Supreme Court, due to the failure to pay the required State tax.

4.4 The State party adds that under article 12.1 of the Code of Administrative Offences, rulings regarding administrative cases may be appealed by the person against whom the administrative case is opened. It notes that Mr. Protsko did not appeal to the Gomel Department of Internal Affairs or to the Ministry of Internal Affairs (as allowed by article 7.2 of the Procedural-Enforcement/Execution Code of Administrative Offences) regarding his apprehension by the Braginsk District Department of Internal Affairs or regarding the fact that an administrative offence record was made against him by the police. Similarly, Mr Tolchin did not appeal to the said institutions against his apprehension and the administrative offence record against him made by the Narovlyansk District Department of Internal Affairs. The authors also did not introduce supervisory claims to the Prosecutor's Office. The State party also points out that Mr. Protsko has failed to submit a supervisory review complaint to the Chairperson of the Supreme Court, and it notes that Mr. Tolchin has failed to appeal directly to the Chairperson of the Supreme Court under the supervisory review proceedings. Thus, according to the State party, the authors have not exhausted all

available domestic remedies and there are no grounds to believe that these remedies would be unavailable or ineffective.

4.5 The State party adds that Mr Tolchin's contention that supervisory review proceedings are ineffective is groundless. In substantiation, it provides statistical figures according to which in 2009, the Prosecutor's Office received 3235 claims relating to administrative offences. Out of them, 518 were acted upon. Based on protest motions by the General Prosecutor's Office, the Supreme Court quashed and modified 126 final rulings on administrative offences which had already been enforced. The above data shows, according to the State party, that prosecutor's supervisory review (nadzor) constitutes an effective remedy for judicial protection and a large number of cases regarding administrative offences are examined each year based on prosecutor's protest motions. With respect to monetary losses which complainants suffer in return for a supervisory claim, the State party notes that compulsory payment of a State tax is provided by law and laws must be complied with.

4.6 Regarding the claim on the incompatibility of the Law on Mass Events with the Covenant's provisions, the State party argues that the law in question does not only aim at regulating the organisation and conduct of mass events, meetings, rallies, demonstrations, pickets and others, but it also aims to provide for conditions for the realisation of the constitutional rights and freedoms of citizens, ensuring public safety and order at the streets, squares or other public venues where such events take place.[1]

4.7 The State party declares that in light of the above considerations, the authors' allegations that their administrative liability constituted a violation of their rights under articles 19 and 21 of Covenant are unfounded.

Authors' comments on the State party's submission

5.1 By letters of 22 November 2010 (received in March 2013), the authors submitted their comments on the State party's observations. They maintain that they have exhausted all available domestic remedies as they have both submitted cassation appeals against the first-instance courts' decisions. According to them, only cassation appeals are effective, as they always result in an assessment of the merits of a case. Supervisory review appeals are ineffective because they are left to the discretion of an official and even if they take place they do not result in a reconsideration of the facts and evidence of the case but are limited to issues of law only. The authors note that according to the Committee, remedies should not only be accessible but also effective. The authors add that no individual complaint to the Constitutional Court is possible in Belarus.

5.2 Mr Tolchin adds that he has complained to the Chairman of the Supreme Court under the supervisory review proceedings but his complaint was not examined as he did not pay the State tax required for such review; he contends that he was unable to pay it at the time. Mr Protsko notes that he also complained to the Chairman of the Supreme Court under the Supervisory review proceedings but his complaint was examined by a deputy-Chairperson of the Supreme Court, who rejected his appeal.

5.3 Mr Tolchin points out that the statistical data submitted by the State party regarding the supervisory review proceedings in administrative cases do not permit to verify how many such cases related to administrative prosecution of public or political activists on

[1] The State party adds that article 9 of this Law lists the locations where mass events cannot take place. At the same time, local authorities have been delegated the right to determine permanent places for the conduct of mass events and also to determine on which sites no such events could take place and to make corresponding announcements through mass media.

clearly political grounds. He expresses doubts that these figures relate to civil and political rights, and explains that he is unaware of the existence in the past ten years of any instance where the Supreme Court or the Prosecutor General's Office had sought the annulment of an administrative case related to the civil and political rights of Belarusian citizens.

5.4 The authors consider that all available domestic remedies for purposes of article 5, paragraph 2 (b), of the Optional Protocol have been exhausted in their cases.

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 rule 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 by 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.

6.3 As to the issue of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the authors have failed to appeal against their apprehension and their administrative prosecution with the Ministry of Internal Affairs; that they failed to request the Prosecutor's Office to initiate a supervisory review; and that the first author has failed to submit a supervisory review complaint to the Chairperson of the Supreme Court; and that the second author failed to submit his request for supervisory review by the Chairperson of the Supreme Court with the requisite State tax.

6.4 The Committee notes, first, that the State party has not provided any explanation as to how a complaint to the Gomel Department of Internal Affairs or to the Ministry of Internal Affairs would be an effective remedy in the authors' cases, for purposes of exhaustion of domestic remedies. Accordingly, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication on this ground.

6.5 The Committee further notes the authors' claim that supervisory review proceedings are neither effective nor accessible. The Committee notes the State party's objections in this respect, and in particular the statistics provided in order to demonstrate that supervisory review was effective in a number of instances regarding administrative cases. However, the Committee notes that the State party has not shown whether, and if so in how many cases, the named procedures have been applied successfully in cases concerning freedom of expression and/or the right to peaceful assembly. The Committee recalls its jurisprudence, according to which the State party's supervisory review procedures against court decisions that have entered into force do not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[2] In light of this, 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 communications.

6.6 The Committee considers that the authors have sufficiently substantiated their claim of a violation of their rights under article 19, paragraph 2, and article 21, of the Covenant. Accordingly, it declares the communications admissible, and proceeds with its consideration of the merits.

[2] See, for example, communication No. 1808/2008, *Kovalenko v. Belarus*, Views adopted on 17 July 2013, paragraph 7.3; communication No. 1785/2008, *Oleshkevich v. Belarus*, Views adopted on 17 March 2013, paragraph 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3.

Consideration of the merits

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

7.2 The first issue before the Committee is whether the seizure of the leaflets and the fine imposed on the first author and the five days administrative detention of the second author, for the distribution of leaflets about two envisaged future public peaceful events to commemorate the memory of those deceased in the Chernobyl accident constitutes a violation of their rights under article 19, paragraph 2, of the Covenant.

7.3 The Committee recalls that article 19, paragraph 2, of the Covenant requires States parties to guarantee the right to freedom of expression, including the right to impart information. The Committee refers to its general comment No. 34, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person; such freedoms are essential for any society and constitute the foundation stone for every free and democratic society.[3] Any restrictions on the exercise of such freedoms must conform to strict tests of necessity and proportionality.[4] Restrictions must "be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".[5]

7.4 The Committee notes that the seizure of leaflets and the fine imposed on the first author and the detention of the second author constitute restrictions on the exercise of the right to impart information. Therefore it must consider whether the respective restrictions imposed on the authors' rights in the present communication are justified under the criteria set out in paragraph 3 of article 19 of the Covenant.

7.5 The Committee recalls that article 19, paragraph 3, of the Covenant allows certain restrictions only as provided by law and necessary: (a) for the respect of the rights and reputation of others; and (b) for the protection of national security or public order (ordre public), or of public health or morals. The Committee notes that if the State imposes a restriction, it is up to the State party to demonstrate that the restrictions imposed on the right guaranteed by article 19, paragraph 2 were necessary in the case in question, and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and the general interest of maintaining public order in a certain area, such system must not operate in a way that is incompatible with the object and purpose of article 19 of the Covenant.[6]

7.6 The Committee has taken note of the authors' claim that the authorities have failed to explain, for purposes of article 19, paragraph 3, of the Covenant, why in their cases it was necessary to restrict their right to impart information about a peaceful assembly, and that the engagement of their administrative responsibility was necessary neither for the respect of the rights or reputations of others, nor for the protection of national security or of public order (ordre public), or of public health or morals.

7.7 The Committee has noted the State party's explanation that both authors were subject to administrative prosecution as by distributing leaflets they have breached the

[3] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

[4] Ibid, para. 22.

[5] Ibid. See also, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, paragraph 7.7.

[6] See, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, paragraph 7.8.

provisions of article 23.34, paragraph 1, of the Code of Administrative Offences regulating organisation or conduct of mass events. The Committee notes that both authors were sanctioned for disseminating information about planned commemorations which had not been authorised by the local authorities, as required under the Law on Mass Events. The Committee notes that under the Law on Mass Events no information about a planned meeting must be disseminated before the meeting has been officially authorized by the competent local authorities and that the failure to do so constitutes an administrative offence under this law. In this connection, the Committee further notes the State party's explanation that the Law on Mass Events not only regulates the organisation and conduct of mass events, meetings, rallies, demonstrations, pickets and others, but also seeks to provide for conditions for the realisation of the constitutional rights and freedoms of the citizens in order to ensure public safety and order on public venues where the events take place. However, the Committee notes that the State party has failed to demonstrate that the fines imposed on the first author and the detention of the second author, even if based on a law, were necessary, for one of the legitimate purposes of article 19, paragraph 3, of the Covenant.

7.8 The Committee recalls that restrictions must not be overbroad and that the "principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law".[7] The Committee observed in general comment No. 34 that a Start party invoking a legitimate ground for restriction of freedom of expression must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[8] As the Gomel Regional Court failed to examine the issue of whether restricting the authors' right to impart information was necessary for purposes of article 19, paragraph 3, of the Covenant, and in the absence of any other pertinent information on file to justify the authorities' decisions, the Committee considers that in the present case the State party has failed to show that the restrictions imposed on the authors' rights met the criteria set out in article 19, paragraph 3, of the Covenant. It therefore concludes that the authors are victims of a violation by the State party of their rights under article 19, paragraph 2, of the Covenant.

7.9 In light of this conclusion, the Committee decides not to examine separately the authors' claims under article 21 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 the authors' rights under article 19, paragraph 2, 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 authors with an effective remedy, in the form of the reimbursement of the present value of the fine and any legal costs incurred by the authors, as well as adequate compensation including for the five days of arrest. The State party is also under an obligation to prevent similar violations in the future. To this end, the State party should review its legislation, particularly the Law on Mass Events, and its implementation, to ensure its compatibility with article 19 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 or not there has

[7] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para.34. See also Communications No. 1128/2002, *Marques v. Angola*; No. 1157/2003, *Coleman v. Australia*.

[8] General comment No. 34 (2011) on freedoms of opinion and expression, para.34.

been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective 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 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.]