



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2165/2012

#### Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	Natalya Pinchuk (represented by counsel, Antoine Bernard)
<i>Alleged victims:</i>	The author's husband, Aleksander Belyatsky
<i>State party:</i>	Belarus
<i>Date of communication:</i>	12 April 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 19 June 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	24 October 2014
<i>Subject matter:</i>	Sentencing of the author's husband to four and a half years of imprisonment for conducting activities on behalf of an unregistered association; allegations of detention on remand in violation of the domestic criminal procedure and trial by a court that is not independent; proceedings in absentia
<i>Substantive issues:</i>	Arbitrary detention; fair hearing by a competent, independent and impartial tribunal; right to be tried in one's presence; freedom of association; effective remedy
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; admissibility <i>ratione personae</i>
<i>Articles of the Covenant:</i>	2, 9, 14 and 22
<i>Articles of the Optional Protocol:</i>	1, 2, 5 (para. 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 (112th session)**

concerning

#### **Communication No. 2165/2011\***

*Submitted by:* Natalya Pinchuk (represented by counsel, Antoine Bernard)

*Alleged victim:* The author's husband, Aleksander Belyatsky

*State party:* Belarus

*Date of communication:* 12 April 2012 (initial submission)

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

*Meeting on 24 October 2014,*

*Having concluded* its consideration of communication No. 2165/2012, submitted to the Human Rights Committee by Natalya Pinchuk 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 pursuant to article 5, paragraph 4, of the Optional Protocol**

1. The communication, dated 12 April 2012, is submitted by Natalya Pinchuk, a Belarus national, on behalf of her husband Aleksander Belyatsky, also a Belarus national. The author claims that her husband is a victim of violations by Belarus of his rights under articles 2, 9, 14 and 22 of the International Covenant on Civil and Political Rights.<sup>1</sup> The author is represented by counsel, Antoine Bernard.

#### **The facts as submitted by the author**

2.1 The author submits that her husband is the chair and one of the founders of the Human Rights Centre Viasna. On 28 October 2003, the Supreme Court of Belarus ruled to liquidate the association for "gross violation of election laws". The author's husband

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\* The following members of the Committee participated in the consideration of the present communication: Lazhari Bouzid, Christine Chanet, Ahmed Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlătescu.

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

submitted a complaint to the Human Rights Committee, and on 24 July 2007, the Committee found a violation of article 22 of the Covenant.<sup>2</sup> The Committee requested the State party to provide appropriate remedies, including compensation and re-registration of the association.

2.2 On 24 August 2007, the Ministry of Justice refused to register the association, indicating the following as the basis for its decision: the majority of the founding members had been previously convicted of committing administrative violations; the statute of the association listed only its main goals, which would imply that it would also engage in other activities not listed in the statute; the statute indicated that the main goal of the association would be to “ensure the rights and freedoms of individuals, based on the Universal Declaration of Human Rights and the Constitution of the Republic of Belarus”, whereas article 20 of the Belarus Law on Public Associations<sup>3</sup> only allows civic associations to defend the rights and legal interests of its own members; the new name of the association, National Civic Association Viasna, was in essence the same as that of the association liquidated by the decision of the Supreme Court in its decision dated 23 October 2003, which contradicted article 12 of the Law on Public Associations; not all documents listed in article 13 of the aforementioned Law, necessary for registration, were submitted (specifically, a receipt was entitled “registration fee”, when it should have been entitled “government tariff”, and did not specify what the payment was for).<sup>4</sup>

2.3 On 24 September 2007, the author’s husband and his associates appealed the decision of the Ministry of Justice before the Supreme Court, arguing that it contradicted the Law on Public Associations and that it violated their constitutional rights. In court they presented the Views of the Human Rights Committee on communication No. 1296/2004. They stated that the registration of the new association, the National Civic Association Viasna, would be sufficient compensation for the violation of their rights. On 26 October 2007, the Supreme Court upheld the decision of the Ministry of Justice in refusing to register the association, stating that: the name of the association contradicted article 12, paragraph 5, of the Law on Public Associations and the registration offices were not provided with the banking documentation regarding the payment of government tariffs, as mandated by article 13 of the Law. The Court made no comment on the Committee’s Views.

2.4 On 26 January 2009, the author’s husband and other founding members filed an application to the Ministry of Justice for the registration of the civic human rights association Nasha Viasna. On 2 March 2009, the Ministry of Justice denied the registration, based on the following grounds: during the initial meeting of the founders an auditor was not elected; the initial meeting of the founders was referred to as a “gathering” whereas, according to the Law on Public Associations it should have been called a “conference” or a “convention”; the list of founding members contained erroneous or incomplete information; there were reasons to believe that the initial meeting of the founders either did not occur at all, or that the individuals present at the initial meeting of the founders were not the same as those identified in the list of founding members; the documentation regarding the payment of government tariffs for registration did not contain information about the name of the association; 35 of the founding members were individuals who had had criminal or

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<sup>2</sup> Communication No. 1296/2004, *Belyatsky et al. v. Belarus*, Views adopted on 24 July 2007.

<sup>3</sup> Law of the Republic of Belarus, No. 3254-XII of 4 October 1994, on Public Associations. Available from [www.legislationline.org/topics/country/42/topic/1](http://www.legislationline.org/topics/country/42/topic/1).

<sup>4</sup> Letter of the Ministry of Justice of Belarus dated 24 August 2007, No. 06-14/912, on the denial of government registration of the civic association; copy provided in Russian by the author.

administrative charges brought against them in the past; the minutes of the initial meeting of the founders did not indicate that a chair and secretary of the meeting had been elected.<sup>5</sup>

2.5 On 20 March 2009, the author's husband and other founding members appealed the above-mentioned decision of the Ministry of Justice, indicating that it contradicted the Law on Public Associations, and requested that the decision be quashed and that the Ministry of Justice be ordered to register the association. On 22 April 2009, the Supreme Court confirmed the legality of the decision of the Ministry of Justice.

2.6 On 25 April 2009, the author's husband and other founders again applied to the Ministry of Justice with the request to register the civic human rights association Nasha Viasna, having provided additional documents, in which the defects of the founding documents indicated by the court were taken into account. On 25 May 2009, the Ministry of Justice again denied them registration based on formalistic grounds. On 18 July 2009, the author's husband and his associates appealed and on 12 August 2009, the Supreme Court again confirmed the decision of the Ministry of Justice.

2.7 The author submits that, on 16 February 2011, the Deputy Procurator-General issued an official warning to her husband, in which it was stated that in the course of a review the Office of the Procurator-General had discovered evidence of the activities he had undertaken on behalf of an unregistered organization, including publications on the organization's site and appearances and commentary where he was identified as the organization's administrator. He was put on notice that, in the event that he continued to violate the law, he could be held accountable. The author's husband filed a complaint about the warning to the Procurator-General, who, in a letter dated 18 March 2011, upheld the legality of the warning. The author's husband filed a complaint to the Central District Court in Minsk, arguing that the particular actions of the Office of the Procurator-General had violated the Constitution and article 22 of the Covenant. On 3 June 2011, the Court issued a decision rejecting the complaint. In the explanatory section of the decision, issued on 20 June 2011, the Court indicated that the complainant had not provided the court any evidence that Nasha Viasna had any organizational structure other than that of a civic association under the Law on Public Associations. The Court did not respond to the claim of the violation of the Constitution and the Covenant. The decision was appealed to the Minsk City Court. On 11 August 2011, the latter found that the arguments that the official warning was contrary to the Constitution and to the Covenant were not relevant to the case. The Minsk City Court noted that the author's husband had been given an official warning owing to his actions on behalf of an unregistered organization, but failed to address the issue of the alleged violations of article 5 of the Constitution and article 22 of the Covenant.

2.8 On 4 August 2011, the author's husband was charged under article 243 of the Criminal Code of Belarus for non-payment of income tax. The Office of the Procurator-General claimed that the author's husband had not paid income tax on money in two bank accounts held in Poland and Lithuania. The author maintains that those funds were not her husband's personal money, but were intended for the activities of the association. The author's husband was arrested on 4 August 2011. The following day, he was remanded to custody pending trial by a detention order of the Deputy Prosecutor of the City of Minsk. On 9 August 2011, he appealed the detention order before the Pervomayskiy District Court in Minsk, which rejected his appeal on 16 August 2011, following a hearing at which he was not present. A further appeal was rejected by the Minsk City Court on 19 August 2011. The author's husband filed further motions on 2 November 2011, before the Pervomayskiy District Court in Minsk, and on 24 January 2012, before the Minsk City Court, to be

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<sup>5</sup> The author provides a copy of the letter of the Ministry of Justice dated 2 March 2009, No. 06-12/145, on the denial of government registration of the civic association.

released from custody. The motions were rejected and the author's husband remained in custody throughout the pretrial proceeding and the trial.

2.9 On 24 November 2011, the Pervomayskiy District Court in Minsk found the author's husband was found guilty of not paying taxes, through failure to file tax declarations, and of knowingly providing false information in tax declarations under article 243.2 of the Criminal Code. The charges brought against him were based on the following facts: that he had opened two bank accounts in foreign banks in Lithuania and Poland, that during the period 2008–2010 funds from foreign and international organizations had been deposited into those accounts; and that he used the funds in those accounts. According to the charges, those funds constituted his personal income, on which he was obligated to pay income tax in Belarus. The author's husband argued that he had been acting as the chair of the Human Rights Centre Viasna, and that owing to the fact that in 2003 the organization had been stripped of its government registration by the decision of the Supreme Court, and that three subsequent requests for registration in 2007 and 2009 had been denied, the organization did not have any legal status within Belarus and could not open bank accounts. As a result, he opened foreign bank accounts in his name, in which he received funds from foreign partners (the Swedish Helsinki Committee for Human Rights, the Norwegian Helsinki Committee, the International Federation for Human Rights and others) to fund human rights activities. Those funds were used by Viasna to: monitor the human rights situation in Belarus, monitor elections, publish literature, carry out educational activities, organize public outreach offices and help victims of political repression. The Court in its verdict found that in the period 2008–2010, the author's husband had received income in the form of money received from outside Belarus, and had avoided paying income tax on that income, which caused losses to the federal budget in particularly large amounts. The author's husband was sentenced to four years and six months of imprisonment, to be served in a high security correctional facility, and confiscation of his property; he was also fined 721,454,017 Belarusian roubles and ordered to pay the State restitution of 36,072,700 Belarusian roubles.

2.10 On 29 November 2011, the author's husband appealed the verdict before the Panel of Judges for Criminal Cases of the Minsk City Court (the appellate court). On 16 and 20 January 2012, he and his lawyer filed additional motions to the court, citing, *inter alia*, fair-trial violations. On 24 January 2012, the appellate court upheld the verdict, with no changes. The author's husband was not present at that hearing. The arguments regarding violations of the freedom of association were ignored by the panel of judges, which did not state its position as to the alleged violation of article 22 of the Covenant. The author maintains that her husband has exhausted all available and effective domestic remedies.

2.11 On 2 April 2012, international non-governmental organizations brought the case of the author's husband to the attention of the Working Group on Arbitrary Detention.

### **The complaint**

3.1 The author claims that by refusing to register the association, the State party violated her husband's right under article 22 of the Covenant. The author maintains that the refusal to register the association limited her husband's right of free association since, according to the internal laws of Belarus, unregistered civic associations are forbidden from carrying out activities within the territory of the country.<sup>6</sup> Moreover, individuals involved in the organization of, or who participate in, civic associations that have not been registered are subject to criminal charges (art. 193.1 of the Criminal Code). She refers to the Committee's jurisprudence, according to which the right to free association includes not only the right to

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<sup>6</sup> Law on Public Associations, art. 7, second paragraph.

freely organize associations, but also guarantees the associations' free and unfettered ability to conduct their statutory activities.<sup>7</sup> The author maintains that the refusals for registration of the Viasna and Nasha Viasna associations imposed limitations inconsistent with the requirements of article 22, paragraph 2, of the Covenant.

3.2 The author maintains that it cannot be claimed that such limitations were set forth in law, since in this particular case it would mean the use of legislation which is contrary to the Covenant, namely, article 193.1 of the Criminal Code. She refers to the Committee's 1997 concluding observations on Belarus (CCPR/C/79/Add.86), in which the Committee had voiced its concern over the difficulties associated with the registration procedures for non-governmental organizations in Belarus, and had recommended that the State party review, without delay, the laws, regulations and administrative practices relating to their registration and activities. However, neither the practices nor the laws have been changed. In denying the registration of the Viasna and Nasha Viasna civic human rights associations, the Government imposed unduly harsh conditions, set forth in the Law on Public Associations, particularly the requirement that the founding members provide detailed personal information (art. 13 of the Law). The author maintains that even if the materials provided by her husband and the other applicants did not completely meet the requirements of the domestic laws, in this particular case limiting the right to free association, by way of denying the registration, was an unduly harsh measure. Since 2003, the association has been operating without official registration. The author further maintains that since the denials of registration were based exclusively on the State party's domestic laws, which contradict the Covenant, the denials also violate the State party's obligations under article 2 of the Covenant.

3.3 The author maintains that, in accordance with the Law on the Office of the Procurator-General of the Republic of Belarus, the Procurator-General has the authority to issue official warnings, which must be obeyed. With respect to activities on behalf of an unregistered organization in Belarus, an individual is subject to criminal accountability under article 193.1 of the Criminal Code. In accordance with article 34.4 of the Criminal Procedure Code, a prosecutor has the authority to bring criminal charges. Consequently, the official warning issued by the Deputy Procurator-General to her husband could realistically have preceded the beginning of a criminal proceeding against him. She argues that the threat of being subjected to criminal prosecution constitutes a limitation of her husband's freedom of association. Moreover, the action of the Office of the Procurator-General, subjecting the author's husband to the requirement to stop his activities on behalf of the unregistered association under the threat of criminal prosecution, does not meet any of the goals set forth in article 22, paragraph 2, of the Covenant. Even if the Government were to provide evidence of the necessity of such limitations, it could never be accepted that the risk of criminal prosecution for such activities constitutes a commensurate measure. Therefore, the official warning issued by the Office of the Procurator-General based on domestic laws, which provide for criminal charges for conducting activities on behalf of an unregistered organization, also violated the rights of the author's husband that are guaranteed under article 22, paragraph 1, of the Covenant.

3.4 The author maintains that the verdict and sentence for activities related to exercising the right of free association established in article 22, paragraph 1, of the Covenant, constitute a limitation of that right, and as such, must meet the conditions set in article 22, paragraph 2. The question is whether the personal punishment of the head of the association on charges of non-payment of taxes on the funds received and spent for the goals of the

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<sup>7</sup> The author refers to communication No. 1478/2006, *Kungurov v. Uzbekistan*, Views adopted on 20 July 2011.

association equals a violation of the right to free association. The Viasna association was deprived of the opportunity to open bank accounts, accumulate financial resources in them and pay taxes (or be exempt from taxes) as a result of its deprivation of legal status through its unlawful dissolution in 2003 and the denial of government registration in 2007 and 2009. Furthermore, even if an association is registered with the State, it is prohibited from opening accounts in foreign banks. Moreover, Belarusian legislation contains a de facto prohibition on receiving funds from abroad for the purposes of human rights activities, equating all foreign donations to humanitarian aid that may be received and used only for a limited list of purposes, which does not include human rights activities.<sup>8</sup> Thus, the Government did not leave any way for the association or its members to raise funding for human rights activities from abroad, other than to use personal accounts opened abroad to receive the money. It is specifically for that activity that the author's husband has been sentenced to a lengthy term of incarceration. The criminal prosecution and conviction against him are aimed at intimidating those who engage or intend to engage in human rights activities. Under article 2 of the Covenant, the State party is obliged to use all administrative and legislative measures necessary to give effect to the rights that are recognized in the Covenant. The State party may not refer to its internal law as justification for its failure to perform a treaty.<sup>9</sup> Moreover, in the present case the judicial organs of the State did not explain which of the grounds referred to in article 22, paragraph 2, of the Covenant, necessitated issuing a criminal conviction against the author's husband for his activities connected with financing the association. Lastly, the author maintains that the punishment imposed on her husband was not commensurate with any of the goals stated by the State party, i.e., it was not necessary in a democratic society.

3.5 In relation to the allegation that her husband's rights under article 14, paragraph 1, of the Covenant have been violated, the author submits that international institutions have repeatedly noted the systemic lack of independence of Belarusian courts, which is linked to the complete control of the Executive Branch and the President of Belarus over the appointment process for judges, the length of their terms, sanction and termination procedures, and their funding. Such institutions have also noted the practical interference of the Executive Branch agencies in the activities of the courts and the biases of the courts in favour of the prosecution.<sup>10</sup> The author submits that on the first day of her husband's trial in the Pervomayskiy District Court in Minsk the prosecutor addressed the following to the defendant: "I recommend that you answer honestly and truthfully to all of the questions, and I suggest that you consider your testimony and how you answer the questions, and if you answer honestly and, moreover, if you agree to pay restitution, the measure of restraint can be changed for you". She maintains that the above statement clearly shows that the custodial measure for the accused was dependent on his testimony and that the State prosecutor had voiced his confidence that the issue of changing the custodial measure depended on him. Despite objections by the defence, the court did not react to this statement by the prosecutor. Thus, the dependence of the court was clearly demonstrated, which is a violation of article 14, paragraph 1, of the Covenant.

3.6 The author also refers to the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to fair trial, in which the Committee clarifies that the same procedural rights are to be provided to all the parties unless

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<sup>8</sup> The author refers to Decree of the President of the Republic of Belarus No. 24 of 28 November 2003 on the receipt and utilization of foreign aid.

<sup>9</sup> Vienna Convention on the Law of Treaties, art. 27.

<sup>10</sup> See the report of the Special Rapporteur on the independence of judges and lawyers on his mission to Belarus (E/CN.4/2001/65/Add.1) and the report of the Working Group on the Universal Periodic Review on Belarus (A/HRC/15/16), recommendations 98.25 and 98.26.

distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. In her husband's case the issue at stake was what the foreign funding was being provided for, and what was it used for. The prosecution insisted that those funds were the author's husband's personal income, on which he had an obligation to pay taxes. The defence insisted that the funds were provided for, and spent on, human rights activities carried out by the association. The author maintains that during the trial the court did not pay equal attention to the evidence that was presented by the prosecution and by the defence, since it accepted uncertified documents presented by the prosecution and did not mention the documents presented by the defence, such as official statements by donors testifying that they had provided funds for the activities of the association. She also maintains that the refusal of the appellate court to seek further evidence directly from the foreign organizations regarding the destination of grants and reports about the expenditure of financial resources also indicates procedural inequality.

3.7 The author maintains that the presumption of innocence was violated with regard to her husband when the State-owned newspapers and television channels disseminated reports proclaiming his guilt before his verdict became final. That helped in convincing the society of his guilt and served to bias qualified judges, in violation of article 14, paragraph 2, of the Covenant. Furthermore, on 2 December 2011, after the verdict had been read but before the appeals proceedings against the verdict were completed, Alexander Lukashenko, President of Belarus, responding to the questions of journalists regarding the case stated: "I think that the court acted very humanely in regard to this opposition activist or whatever you call him." This statement by the President leaves no doubt as to his position regarding the guilt of the author's husband and his opinion on the leniency of his sentence. Considering that, pursuant to the laws of Belarus, the President exercises complete control over the process of appointing and removing judges, there is cause to fear that, by voicing his opinion, he influenced the subsequent decisions of the appellate court, which also constitutes a violation of article 14, paragraph 2, of the Covenant. Lastly, throughout the course of the proceedings in the lower court, the author's husband was kept in a cage. He was brought to court and taken back to the detention facility in handcuffs, which were taken off when he was placed in the cage and put back on when he was removed from it. This was shown repeatedly on Belarusian television. Keeping incarcerated individuals in cages and using handcuffs on them is standard practice in Belarusian courts. However, in this particular instance there was no reasonable justification for the use of such security measures. Keeping the defendant in a cage and in handcuffs created an image of him in the public's eye as a dangerous criminal, which is a further violation of article 14, paragraph 2, of the Covenant.

3.8 The author also submits that her husband's right under article 14, paragraph 3 (d), of the Covenant, to be tried in his presence had been violated, since he had sent a written request to the appellate court to be present at the appellate hearing, which the court rejected, referring to provisions of the domestic legislation (art. 382.2 and art. 382.4 of the Criminal Procedure Code), under which the court is not obliged to ensure the participation of the accused in the hearings. In this case the appellate court considered not only questions of the law, but also the actual circumstances of the case and the question of the guilt of her husband. Thus, the denial of the right to be tried in his presence and be heard by the court constitutes a violation of article 14, paragraph 3 (d), of the Covenant, as well as a violation of article 2 of the Covenant, as the State party has not provided the right in its internal legislation.

3.9 The author maintains that her husband's rights under article 9 of the Covenant have been violated, because the decision of 5 August 2011 regarding his remand in custody had been taken by an investigative organ and neither that decision, nor the review decisions of the Pervomayskiy District Court in Minsk, contained any justification of the necessity,



reasonableness and proportionality of the custodial measure, which is a violation of the requirements of article 126.2 of the Criminal Procedure Code. The reasons indicated in the decisions refer either to abstract formulas from legal acts, for example, the possibility that the defendant could “escape from the criminal prosecution organs and the court”, “create obstacles to the preliminary investigation of the criminal case or its consideration by the court” or “conceal or forge materials which are significant for the case”, or are not provided for under the law, for example “for the purpose of securing the proper consideration of the criminal case”. There is no assessment of concrete evidence of a real danger that the accused could escape from justice, destroy evidence or violate the law. Further, the decisions of the courts taken on the question of the legality of the custodial placement were based on article 126.1 of the Criminal Procedure Code, pursuant to which the measure of restraint in the form of custodial placement can be applied to persons who are suspected of committing serious offences solely on the basis of the level of the offence. The author maintains that that provision fails to meet international standards, in so far as that approach is not based on the individual assessment of the possibility of accused engaging in unlawful behavior during the investigation of the case and its consideration by the court. The author maintains that under these circumstances her husband’s detention constituted an arbitrary custodial placement in violation of article 9, paragraph 1, of the Covenant.

3.10 The author submits that, according to the Criminal Procedure Code, a custodial placement is made on the basis of a decision of the investigator and sanctioned by a prosecutor or other criminal prosecution organs (art. 126.4 of the Criminal Procedure Code). She notes that in its jurisprudence the Committee has stated that the State prosecutor is not a person who possesses the necessary institutional independence and impartiality to be considered as “[an]other officer authorized by law to exercise judicial power”, within the meaning of article 9, paragraph 3, since the due administration of judicial power can be conducted only by an organ which is independent, objective, impartial and unbiased with regard to the questions under consideration.<sup>11</sup> She underlines that not only was her husband placed in custody by the order of the Deputy Prosecutor on 5 August 2011, but he did not appear before a court until 2 November 2011. She maintains that the delay of three months must be declared incompatible with article 9, paragraph 3, of the Covenant.

3.11 Regarding the alleged violation of her husband’s rights under article 9, paragraph 4, of the Covenant, the author refers to the Committee’s jurisprudence that court review of the lawfulness of detention must include the possibility of ordering release from custody and must not be limited to mere formal compliance of the detention with domestic law governing the detention.<sup>12</sup> Judicial review of the legality of detention must allow for the possibility of ordering the release of individuals if their detention is considered incompatible with the provisions of the Covenant, particularly those of article 9, paragraph 1.<sup>13</sup> She maintains that the Pervomayskiy District Court in Minsk and the Minsk City Court failed to observe those requirements while considering the appeals against the custodial placement of her husband. The decisions of the courts simply confirm the legality of the detention, referring to the absence of violations of the domestic legislation. The court decisions do not contain references to the consideration of any evidence providing sufficient grounds to establish the necessity, reasonableness and proportionality of the use

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<sup>11</sup> The author does not provide a specific reference to the Committee’s jurisprudence.

<sup>12</sup> The author refers to communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 9.5, and communication No. 1324/2004, *Shafiq v. Australia*, Views adopted on 31 October 2006, para. 7.4.

<sup>13</sup> The author refers to communication No. 1172/2003, *Abbassi v. Algeria*, Views adopted on 28 March 2007, para. 8.5, and communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007, para. 8.4.

of this measure towards the specific individual in the specific circumstances. Moreover, the court review was conducted in the absence of the author's husband; he was thus deprived of the opportunity to present explanations concerning his specific circumstances. Accordingly, she maintains that there has been a violation of article 9, paragraph 4, of the Covenant.

#### **The State party's observations**

4. On 25 July 2012, the State party noted the lack of legal grounds for the consideration of the communication, both on admissibility and on the merits. The State party submits that the communication was brought before the Human Rights Committee by third-party individuals instead of the individual himself. Moreover, it had been brought to the attention of, and was currently under examination by, the Working Group on Arbitrary Detention. In addition, the State party maintains that the individual did not exhaust all available domestic remedies, as required by article 2 of the Optional Protocol to the Covenant. The State party refers to some of its submissions on other communications, dated 6 January 2011 and 25 January 2012, and submits that it considers the registration of the present communication as done in violation of articles 1, 2 and 5, paragraph 2 (a) and (b), of the Optional Protocol. It submits that it has discontinued proceedings regarding communication No. 2165/2012 and "will disassociate itself from the views that might be adopted on it by the Human Rights Committee".

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

5.1 On 22 October 2012, in response to the State party's observations, the author stated that the communication had been submitted by her, based on a letter provided by her husband on 27 January 2012 authorizing her to represent his interests before the Committee. Based on that, the author authorized Mr. Bernard to provide legal assistance and represent her during the proceedings relating to communication No. 2165/2012. The above is in accordance with the practice and rules of procedure of the Committee. Moreover, the institution of representation is present in the legal system of Belarus as well, including the ability of a representative to submit a complaint on behalf of an individual who claims that his rights and freedoms have been violated.

5.2 Regarding the fact the same matter was brought to the attention of the Working Group on Arbitrary Detention and was under its examination, the author submits that the mandate of the Working Group was established by the former Commission on Human Rights; the Working Group is not authorized to issue decisions which are binding for the Government and which identify a violation by the Government of a specific right established by the Covenant, nor can it oblige the Government to take measures to rectify the violation. Thus, the proceeding cannot be considered as another "procedure of international investigation or settlement" as defined in article 5, paragraph 2, of the Optional Protocol. Moreover, the communication contains not only allegations of violation of rights under article 9 of the Covenant, but also of violations of articles 14 and 22 of the Covenant, the consideration of which falls outside the sphere of competence of the Working Group on Arbitrary Detention.

5.3 Regarding the State party's claims that the author's husband did not exhaust all available domestic remedies provided for in the Belarusian legislation, the author recalls that she had made reference to all the legal avenues that her husband had attempted to follow to remedy the stated violations of his rights under articles 9, 14 and 22 of the Covenant, as well as to the decisions of the courts of Belarus in response to those complaints. She reiterates the facts and the dates of the various complaints (see paras. 2.2–2.10 above). She further submits that in long-standing jurisprudence, supervisory review proceedings that constitute a discretionary review of sentences handed down by courts, widespread in the former republics of the Soviet Union, has not been considered by the

Committee to constitute an effective remedy.<sup>14</sup> The European Court of Human Rights takes the same position, stating that applications for the use of judicial supervisory review constitute extraordinary remedies, the use of which depends on the discretionary powers of supervisory officials of the courts and the prosecutor's office, and that therefore such petitions do not constitute effective remedies.<sup>15</sup> The author maintains that at the time the communication was presented to the Committee, her husband had already exhausted all effective means of legal defence provided for under the laws of Belarus. Moreover, her husband had petitioned for a supervisory review of the verdict in his criminal case and the ruling of the appellate court to the Chief Judge of the Minsk City Court and, subsequently to the Deputy Chief Justice of the Supreme Court; both judges rejected the petitions, on, respectively, 17 May 2012 and 4 September 2012.<sup>16</sup> The responses from those officials provide the concise opinions that the rulings of the first instance courts and appellate court were legal. However, no foundation is provided for the decisions, nor is there a legal analysis of the arguments put forth in the complaint lodged by the author's husband. The author maintains that the above serves as additional evidence of the lack of effectiveness of the option of petitioning for a supervisory review.

5.4 On 15 July 2014, the author submitted that, on 21 June 2014, her husband was released from prison, following an amnesty. She maintains that the amnesty does not constitute an admission by the State party of a violation of rights under the Covenant, and requests the Committee to proceed with the examination of the communication on its merits. She maintains that it is still impossible to register or legalize the activities of human rights groups in Belarus, that human rights defenders are under a permanent and real threat of criminal prosecution for activities carried out on behalf of unregistered organizations and for seeking financial support for their activities. The Committee's decision should also address the issues of redress and non-recurrence.

### **Issues and proceedings before the Committee**

#### *The State party's lack of cooperation*

6.1 The Committee notes the State party's submission that it considers the registration of the present communication as done in violation of articles 1, 2 and 5, paragraphs 2 (a) and (b), of the Optional Protocol, that it has discontinued proceedings regarding the communication and that it will disassociate itself from the Views that might be adopted on it by the Human Rights Committee.

6.2 The Committee recalls that article 39, paragraph 2, of the International Covenant on Civil and Political Rights authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation of any of the rights set forth in the Covenant.<sup>17</sup> Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the

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<sup>14</sup> The author refers to communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, Views adopted on 20 March 2009, para. 6.1.

<sup>15</sup> The author refers to the case of *Tumilovich v. Russia*, Application No. 47033/99, judgement of 22 June 1999.

<sup>16</sup> The author submits copies of the petitions and the responses.

<sup>17</sup> Optional Protocol, preamble and art. 1.

individual concerned.<sup>18</sup> It is incompatible with the obligations under article 1 of the Optional Protocol for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.<sup>19</sup> It is for the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and on the merits of the communications, the State party violates its obligations under article 1 of the Optional Protocol to the Covenant.<sup>20</sup>

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee takes note of the State party's submission that the communication had been brought to the attention of the Working Group on Arbitrary Detention and was under its examination. The Committee notes that Mr. Belyatsky's case was examined by the Working Group on Arbitrary Detention, which issued an opinion on 31 August 2012 (A/HRC/WGAD/2012/39). Since the matter is no longer being examined by the Working Group on Arbitrary Detention, the Committee concludes that it is not precluded by the above provision from examining it.

7.3 With regard to the author's claims under article 2 of the Covenant, the Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant lay down general obligations for States parties, and that they cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.<sup>21</sup> The Committee therefore considers that the author's claims in this regard are incompatible with article 2 of the Covenant and inadmissible under article 3 of the Optional Protocol.

7.4 The Committee notes the author's claim under article 14 of the Covenant, according to which the courts have acted in a biased manner in her husband's case, given that the first instance court did not object to certain statements of the prosecution and based on general information regarding the judicial system in the State party. In the absence of any other pertinent information in this respect, the Committee considers, however, that the author has failed to sufficiently substantiate this claim for purposes of admissibility. Accordingly, it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 The Committee notes the author's claim that her husband's rights under article 14, paragraph 3 (d), to be tried in his presence had been violated since he had sent a written request to the appellate court to be present at the appellate hearing, but the court had rejected it. The Committee, however, observes that the lawyer of the author's husband was

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<sup>18</sup> Ibid., art. 5, paras. 1 and 4.

<sup>19</sup> See, inter alia, communications No. 869/1999, *Piandiong et al. v. Philippines*, Views adopted on 19 October 2000, para. 5.1, and Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al. v. Kyrgyzstan*, Views adopted on 16 July 2008, paras. 10.1–10.3.

<sup>20</sup> See, inter alia, communication No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, para. 8.2.

<sup>21</sup> See communications No. 2202/2012, *Rodríguez Castañeda v. Mexico*, Views adopted on 18 July 2013, para. 6.8, No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility adopted on 23 July 2012, para. 8.5, and No. 1887/2009, *Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4.

present at the appellate hearing. In the absence of any other pertinent information in this respect, the Committee considers that the author has failed to sufficiently substantiate this claim for purposes of admissibility and finds that it is inadmissible under article 2 of the Optional Protocol.

7.6 The Committee notes the State party's submission that the communication had been brought before the Committee by third-party individuals instead of the individual himself. In this respect, the Committee recalls that rule 96 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual's representative, but that a communication submitted on behalf of an alleged victim may be accepted when it appears that the individual in question is unable to submit the communication personally.<sup>22</sup> In the present case, the Committee notes that the alleged victim, who was in prison when the communication was submitted, had issued a letter of authorization to his wife and that the latter in turn authorized counsel to represent the alleged victim before the Committee. Accordingly, the Committee considers that it is not precluded by article 1 of the Optional Protocol from examining the communication.

7.7 The Committee notes the State party's submission that the author's husband had failed to exhaust the available domestic remedies. It observes that the State party does not point out any concrete remedies that could have been pursued by the author's husband. The Committee notes the author's explanation that her husband had exhausted all available domestic remedies and her contention that the supervisory review procedure does not constitute an effective domestic remedy. It also notes that the author's husband had petitioned for a supervisory review of the verdict in his criminal case and of the ruling of the appellate court, to the Chief Judge of the Minsk City Court and to the Deputy Chief Justice of the Supreme Court, and that those petitions had been rejected, respectively, on 17 May 2012 and on 4 September 2012. In this regard, the Committee recalls its jurisprudence, according to which a petition to a prosecutor's office for supervisory review, allowing for a review of court decisions that have taken effect, does not constitute a remedy that has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.<sup>23</sup> In the circumstances, the Committee considers that it is not precluded, for purposes of admissibility, by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

7.8 The Committee considers that the author has sufficiently substantiated her remaining claims under articles 9, 14 (para. 2) and 22 (para. 1), of the Covenant, for purposes of admissibility. Accordingly, it declares these claims admissible and proceeds to their examination on the merits.

#### *Consideration of the merits*

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

8.2 The Committee notes the author's allegations regarding the pretrial detention of her husband, including that the decision of 5 August 2011 regarding his remand in custody had been taken by a prosecutor rather than by a judge, and that this decision and the decisions of the court that reviewed the detention order did not contain any reasoning as to the necessity, reasonableness and proportionality of the custodial measure. The Committee

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<sup>22</sup> See also communications No. 1355/2005, *X. v. Serbia*, decision of inadmissibility adopted on 26 March 2007, para. 6.3, and No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, Views of 29 October 2012, para. 10.2.

<sup>23</sup> See, for example, communication No. 1986/2010, *Kozlov v. Belarus*, Views adopted on 24 July 2014, para. 6.3.

further notes the author's allegation that article 126.1 of the Criminal Procedure Code allows custodial placement solely on the basis of the seriousness of the offence and that, accordingly, her husband's detention was arbitrary. In the absence of a reply from the State party on these issues, the Committee finds that the above allegations should be given due weight, and that the facts described disclose several violations of the author's husband's right to liberty of person as guaranteed by article 9 of the Covenant.<sup>24</sup> Consequently, the Committee finds that article 9 of the Covenant has been violated in the present case.

8.3 The Committee notes the author's claim that the presumption of innocence was violated with regard to her husband, because the State-owned newspapers and television channels disseminated reports proclaiming his guilt before his verdict had been confirmed on appeal; because the President of the country made a public statement, clearly indicating his position regarding the guilt of the author's husband; and because throughout the court proceedings the author's husband was brought to court and taken back to the detention facility in handcuffs and was kept in a cage in the courtroom, which was also broadcasted on the State media. In the absence of a reply from the State party on these issues, the Committee finds that the above allegations should be given due weight, and that the facts described disclose a violation of the presumption of innocence with regard to the author's husband. Consequently, the Committee finds that article 14, paragraph 2, of the Covenant has been violated in the present case.

8.4 Regarding the alleged violations of article 22 of the Covenant, the issue before the Committee is whether the refusal of the Belarus authorities to register the Viasna or Nasha Viasna association unreasonably restricted the author's husband's right to freedom of association. In accordance with article 22, paragraph 2, of the Covenant, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be prescribed by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be necessary in a democratic society for achieving one of those purposes.<sup>25</sup> The reference to "democratic society" in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those that peacefully promote ideas not necessarily favourably viewed by the Government or the majority of the population, is a cornerstone of any democratic society.

8.5 In the present case, the Committee notes that the author's husband held the position of chair of the association and that he applied for its registration, together with other founding members, on three different occasions. The Committee observes that the State party has refused to permit the registration of the association on the basis of a number of stated reasons, some of which appear to be highly technical and some of which appear to be inconsistent with the Covenant. Those reasons must be assessed in the light of the consequences which arise for the author's husband and his freedom of association. The Committee notes that even if such reasons were prescribed by the relevant law, the State party has not advanced any argument as to why they are either legitimate or necessary, in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. The Committee also notes that the refusal of registration led directly to the unlawfulness of operation of the unregistered organization on the State party's territory and directly precluded the author from enjoying his freedom of association with the other members of the association.

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<sup>24</sup> See, for example, communications No. 1085/2002, *Taright et al. v. Algeria*, Views adopted on 15 March 2006, paras. 8.3–8.4; No. 1178/2003, *Smantser v. Belarus*, Views adopted on 23 October 2008, paras. 10.2–10.3; and No. 1787/2008, *Kovsh v. Belarus*, Views adopted on 27 March 2013, paras. 7.3–7.5.

<sup>25</sup> See, inter alia, communication No. 1039/2001, *Zvozskov et al. v. Belarus*, Views adopted on 17 October 2006, para. 7.2.

Accordingly, the Committee concludes that the refusal of registration does not meet the requirements of article 22, paragraph 2, in relation to the author's husband. Mr. Belyatsky's rights under article 22, paragraph 1, of the Covenant have thus been violated.<sup>26</sup>

8.6 Further, the Committee notes the author's allegations that after the State party had repeatedly obstructed the registration of the association, the Office of the Procurator-General issued an official warning to her husband that he risked prosecution for engaging in activities on behalf of an unregistered association; that subsequently he was prosecuted on tax charges; that those tax charges arose from the fact that he had maintained a bank account in his own name on behalf of the association because the refusal of the State party to register the association prevented him from opening accounts in the association's name; that in his trial the court did not take into account evidence that the funds were received and spent for the legitimate purposes of the association; that he had been convicted and sentenced to four and a half years of incarceration, and had had financial sanctions imposed; and that the courts did not explain how those measures were consistent with his right to freedom of association, in particular, how the conviction and sentence were proportionate to any of the goals stated in article 22, paragraph 2. In the absence of a reply from the State party on these issues, the Committee finds that the above-mentioned allegations should be given due weight. Taken in the context of the violations found in paragraph 8.5, and in this Committee's earlier Views,<sup>27</sup> and absent any persuasive explanation by the State party, the Committee concludes that the facts described disclose a violation of the author's husband's right to freedom of association. Consequently, the Committee finds that article 22 of the Covenant has been violated in the present case.

9. 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 by Belarus of the author's husband's rights under articles 9, 14 (para. 2) and 22 (para. 1) of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the author's husband is entitled to an appropriate remedy, including (a) the reconsideration of the application for registration of the Viasna association, based on criteria compliant with the requirements of article 22 of the Covenant; (b) removal of the criminal conviction from his criminal record; and (c) adequate compensation, including reimbursement of the legal costs incurred. The State party is also under the obligation to prevent similar violations in the future. In this connection, the State party should review its internal legislation to ensure its compliance with the requirements of article 22 of the Covenant.

11. 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 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 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. In addition, it requests the State party to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

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<sup>26</sup> See, inter alia, communication No. 1383/2005, *Katsora et al. v. Belarus*, Views adopted on 25 October 2010, para. 8.3; *Zvozkov et al. v. Belarus*, para. 7.4; and communication No. 1478/2006, *Kungurov v. Uzbekistan*, Views adopted on 20 July 2011, paras. 8.5–8.9.

<sup>27</sup> See footnote 2 above.