



International Covenant on Civil and Political Rights

Distr.: General
7 December 2015

Original: English

Human Rights Committee

Communication No. 2141/2012

Views adopted by the Committee at its 115th session (19 October-6 November 2015)

| | |
|---|--|
| <i>Submitted by:</i> | Kostenko Philippe Arkadyevich (represented by counsels, Olga Tseytlina and Sergey Golubok) |
| <i>Alleged victim:</i> | The author |
| <i>State party:</i> | Russian Federation |
| <i>Date of communication:</i> | 28 February 2012 (initial submission) |
| <i>Document references:</i> | Special Rapporteur's rule 97 decision, transmitted to the State party on 21 March 2012 (not issued in document form) |
| <i>Date of adoption of Views:</i> | 23 October 2015 |
| <i>Subject matter:</i> | Author's detention, trial, conviction and sentencing on charges of using obscene language towards the police |
| <i>Procedural issue:</i> | Admissibility – exhaustion of domestic remedies; admissibility – manifestly ill-founded |
| <i>Substantive issues:</i> | Administrative arrest/detention; freedom of assembly; freedom of opinion and expression; necessary in a democratic society |
| <i>Articles of the Covenant:</i> | 14, 19 and 21 |
| <i>Articles of the Optional Protocol:</i> | 2 and 5 (2) (b) |

GE.15-21312(E)



Please recycle



Annex

Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political rights (115th session)

concerning

Communication No. 2141/2012*

Submitted by: Kostenko Philippe Arkadyevich (represented by counsels, Olga Tseytlina and Sergey Golubok)

Alleged victim: The author

State party: Russian Federation

Date of communication: 28 February 2012 (initial submission)

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

Meeting on 23 October 2015,

Having concluded its consideration of communication No. 2141/2012, submitted to it 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 (4) of the Optional Protocol

1. The author of the communication is Philippe Arkadyevich Kostenko, a Russian national born on 14 January 1985. The author claims to be a victim of violations by the Russian Federation of his rights under articles 14 (3) (e), 19 and 21 of the Covenant.¹ The author is represented by counsels, Olga Tseytlina and Sergey Golubok.

Factual background

2.1 The author submits that he is a human rights defender and that he is a victim of a virulent campaign of harassment organized by the authorities. Between 2008 and 2011, he was charged with various offences related to distributing leaflets, putting up posters, violating the regulations on organizing public gatherings and other forms of activism, and was sentenced to fines on several occasions and to 15 days in jail, which he served from 7

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvio, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

¹ The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

to 21 December 2011. On 21 December 2011, having served the 15-day sentence, he was immediately rearrested by the police in St. Petersburg and charged with using obscene language in public. From the court decisions, it appears that the author was arrested and charged in relation with events that took place on 16 October 2011. On that date, the author and several other activists took food and water to a police station and attempted to deliver them to acquaintances of his who were in detention. The police officers at the station refused to take the goods and a verbal exchange followed. The police arrested the author and issued a police report (protocol) charging him with minor hooliganism, specifically, using foul language in public. On 22 December 2011, the author was brought before the justice of the peace for judicial circuit No. 153 to stand trial for that offence. During the proceedings, the justice of the peace rejected all the author's requests, including for the adjournment of the proceedings and to call police officers as witnesses, as their written reports were the only incriminating evidence against him. On the same day, the author was convicted and sentenced to another 15-day jail sentence.

2.2 On 23 December 2011, the author appealed that conviction before Petrogradskiy District Court, alleging inter alia that the court had used police officers' statements in evidence, that he had been denied the opportunity to cross-examine the officers in court and that the punishment imposed on him was disproportionate to the gravity of the offence committed and infringed his freedom of expression. The District Court dismissed the author's appeal on 26 December 2011. On an unspecified date, the author lodged an application for a supervisory review before St. Petersburg City Court, with essentially the same arguments, which that court rejected on 13 February 2012. The author served his sentence in full in December 2011 and January 2012 in the specialized detention centre of the Chief Directorate of the Interior in St. Petersburg. At the time of submission of the communication, there were two more cases pending against the author.

2.3 The author submits that even though, in theory, he could petition the Supreme Court for a supervisory review, he does not consider that to be an effective remedy, and he makes reference to the jurisprudence of the Human Rights Committee and the European Court of Human Rights in that regard. The author contends that all available and effective domestic remedies have been exhausted.

The complaint

3.1 The author claims that there were serious breaches of procedural norms and of his constitutional and procedural rights in the trial that was conducted against him. He maintains that even though the charges were designated as administrative charges, the proceedings against him were criminal within the meaning of article 14 of the Covenant, as he faced and served a jail sentence. The author, who throughout the proceedings maintained that the accusations were fake, submits that he was refused the right to cross-examine the witnesses, whose statements were the only evidence against him; he maintains that that was in violation of his rights under article 14 (3) (e) of the Covenant. He also submits that this crucial irregularity undermined the overall fairness of the criminal proceedings against him, in violation of article 14 (1) of the Covenant.

3.2 The author further submits that, even if he had used obscene language in public, the punishment imposed on him was disproportionate to the gravity of the offence. Taking into consideration that the offence in question, as recognized by the courts, was non-violent verbal expression, the jail sentence infringed the author's rights under article 19 of the Covenant. The author refers to the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, in which the Committee has emphasized that any restriction on freedom of expression must conform to the strict tests of necessity and proportionality; he maintains that those tests should also apply to the punishment imposed. The author makes reference to the jurisprudence of the European Court of Human Rights,

according to which the imposition of imprisonment for exercising one's freedom of expression is permitted only in cases of hate speech and incitement to violence. He submits that in his case, there has never been any suggestion that he used hate speech or incited violence.

3.3 The author also submits that, given the context and his public profile, his imprisonment on absurd and manifestly ill-founded charges was aimed at curtailing his activism, in particular not allowing him to be physically present at and to participate in the peaceful protests that were held in St. Petersburg in December 2011, in violation of his rights under article 21 of the Covenant.

3.4 The author requests that the State party provide him with appropriate remedies, including by issuing a public apology, quashing his criminal conviction, clearing his criminal record and giving him compensation.

State party's observations on admissibility

4.1 In its observations dated 17 August 2012 and 17 February 2014, the State party submits that the author was found guilty of having committed an administrative offence under article 20.1, part 1, of the Code of Administrative Offences (minor hooliganism) by the justice of the peace for judicial circuit No. 153 of St. Petersburg in the ruling of 22 December 2011. He was sentenced to 15 days of administrative detention, as provided for in that article.

4.2 On 23 December 2011, his lawyer filed an appeal against the ruling, claiming that his rights had been violated. In particular, the appeal argued that the judge had refused to postpone the consideration of the case regardless of the author's ill health. The appeal also stated that the defence did not have a chance to fully acquaint itself with the case file, the actions of the author did not constitute an administrative violation, the court refused to take witness statements into consideration and the punishment imposed was disproportionate to the gravity of the act that had been committed. On 26 December 2011, Petrogradskiy District Court rejected the appeal. On 13 February 2012, St. Petersburg City Court rejected a further appeal, finding that the arguments of the defence were unfounded. It rejected the claim that the author's actions did not constitute an administrative violation because that was not confirmed by the protocol on administrative violation, which describes the nature and the circumstances of the offence that was committed, namely minor hooliganism. The State party refers to the definition of that offence and submits that it was established that the author used foul language while in a public area, did not react to reprimands, expressing open disrespect for the public and therefore his behaviour was correctly qualified under article 20.1, part 1, of the Code of Administrative Offences. The claim that his right to a defence had been violated was not confirmed by the case materials.

4.3 The State party notes that the author did not file any further court appeals, including to the Supreme Court. It submits that under article 126 of the Constitution, article 19 of the Federal Constitutional Law "On the judicial system" and article 9 of the Federal Constitutional Law "On the courts of general jurisdiction", the Supreme Court of the Russian Federation is the highest judicial instance regarding administrative matters. The State party therefore maintains that the author failed to exhaust all the available domestic remedies, which renders his communication inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

Author's comments on the State party's observations

5.1 In his submission dated 20 September 2012, the author notes that the State party had argued that in his case there had been no infringement of the application of the domestic legal provisions, in particular of the Code of Administrative Offences. He maintains,

however, that the gist of his complaint concerned the infringement of his internationally protected human rights under articles 14, 19 (in the light of the interpretation of that provision in the Committee's general comment No. 34) and 21 of the Covenant. He regrets that the State party's observations do not address those claims and that the Covenant is not even mentioned. He submits that his allegations are unanswered by the State party and respectfully requests the Committee to rule in his favour.

5.2 Regarding the State party's submission that he has failed to exhaust domestic remedies, the author submits that the suggested remedy, namely a request for a supervisory review to the Supreme Court, does not constitute an effective remedy for the purposes of admissibility. He refers to the Committee's jurisprudence in that regard² and maintains that the State party has demonstrated no reason to depart from the Committee's well-established case law.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not it is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies under articles 2 and 5 (2) (b) of the Optional Protocol on the ground that the author failed to exhaust the available domestic remedies in that he did not file an appeal before the Supreme Court of the Russian Federation, which is the highest judicial instance in administrative issues. The Committee notes that the provisions of the domestic laws to which the State party refers, namely article 126 of the Constitution, article 19 of the Federal Constitutional Law "On the judicial system" and article 9 of the Federal Constitutional Law "On the courts of general jurisdiction", do not specify any particular remedy, but merely outline the role of the Supreme Court in the domestic legal system. The Committee also notes the author's submission that the only remaining remedy for him would be to request a supervisory review. The Committee recalls its jurisprudence³ that filing requests for supervisory review to the president of a court directed against court decisions that have entered into force and depend on the discretionary power of a judge constitutes an extraordinary remedy and that the State party must show that there is a reasonable prospect that such requests would

² The author refers to communication No. 1866/2009, *Chebotareva v. Russia*, Views adopted on 26 March 2012, para. 8.3, in which the Committee stated that "supervisory review procedures against court decisions which have entered into force constitute an extraordinary remedy, dependent on the discretionary power of a judge ... and which, thus, do not need to be exhausted for purposes of admissibility".

³ See communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, para. 7.4; No. 1851/2008, *Sekerko v. Belarus*, Views adopted on 28 October 2013, para. 8.3; Nos. 1919-1920/2009, *Protsko and Tolchin v. Belarus*, Views adopted on 1 November 2013, para. 6.5; No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2; No. 2021/2010, *E.Z. v. Kazakhstan*, decision of inadmissibility adopted on 1 April 2015, para. 7.3; No. 1873/2009, *Alekseev v. Russian Federation*, Views adopted on 25 October 2013, para. 8.4; No. 2041/2011, *Dorofeev v. Russian Federation*, Views adopted on 11 July 2014, para. 9.6.

provide an effective remedy in the circumstances of the case.⁴ The State party has not shown, however, whether and in how many cases petitions to the president of the Supreme Court for supervisory review procedures were applied successfully in cases concerning the right to a fair trial or freedom of expression. In these circumstances, the Committee considers that it is not precluded by articles 2 and 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee notes the author's claim that his imprisonment on absurd and manifestly ill-founded charges was aimed at curtailing his activism, in particular not allowing him to be physically present at and to participate in the peaceful protests that were held in St. Petersburg in December 2011, in violation of his rights under article 21 of the Covenant. In the absence of any other detailed and documented information in support of those allegations or on whether the allegations were raised in domestic proceedings, the Committee considers that that claim has been insufficiently substantiated for the purposes of admissibility. The claim is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The Committee declares the remaining claims under articles 14 (3) (e) and 19 of the Covenant admissible and proceeds with their examination on the merits.

Consideration of the merits

7.1 The 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 (1) of the Optional Protocol.

7.2 The Committee takes note of author's claims that he was detained immediately after being released from serving a prison sentence and was charged with using foul language based solely on a report prepared by police officers. The Committee notes, based on the court decisions, that the author was tried and convicted in relation to an incident that took place on 16 October 2011, when he entered into verbal conflict with police officers while trying to deliver food to his acquaintances who were in detention. The Committee takes note of the author's claim that, even if he had used obscene language in public, the punishment imposed on him was disproportionate to the gravity of the offence. The issue before the Committee therefore is to consider whether the State party, by detaining and charging the author with an administrative offence and subsequently sentencing him to 15 days of imprisonment, has unjustifiably restricted his rights as guaranteed in article 19 of the Covenant.

7.3 The Committee recalls that article 19 (3) of the Covenant allows certain restrictions, but only as provided by law and necessary (a) for respect of the rights or reputations of others, or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. It observes that any restriction on the exercise of the rights provided for in article 19 (2) must conform to the strict test of necessity and proportionality and must be directly related to the specific need on which they are predicated.⁵

⁴ See, for example, *Dorofeev v. Russian Federation*, para. 9.6; *Gelazauskas v. Lithuania*, para. 7.4; *P.L. v. Belarus*, para. 6.2; communications No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para. 7.3; *Schumilin v. Belarus*, para. 8.3; No. 1839/2008, *Komarovsky v. Belarus*, Views adopted on 25 October 2013, para. 8.3; No. 1903/2009, *Youbko v. Belarus*, Views adopted on 17 March 2014, para. 8.3; No. 1929/2010, *Lozenko v. Belarus*, Views adopted on 24 October 2014, para. 6.3.

⁵ See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 22. See also, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.7.

7.4 The Committee notes the State party's argument that the author was arrested because he had used foul language in public, in violation of article 20.1, part 1, of the Code of Administrative Offences, and that his conviction was made in accordance with domestic law. The Committee also notes that the author alleges that he was voicing his objections to the actions of the police. The Committee observes that the arrest, conviction and sentencing of the author resulted in restriction of his freedom to express an opinion. In that connection, the Committee recalls that it is for the State party to demonstrate that the restriction imposed was necessary in the case in question for one of the legitimate purposes listed in article 19 (3) of the Covenant.⁶ The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value that the restriction serves to protect.⁷ The Committee observes that, while the State party appears to imply that the author's conviction and sentence were necessary for the protection of public order, it has not provided a justification as to why it was necessary and proportionate to rearrest the author two months after the events and impose on him the maximum sentence provided by the law, namely 15 days of imprisonment, which he served. Even assuming that his arrest and detention had a basis in domestic law, and that his conviction pursued a legitimate aim, such as protecting public order, it cannot be said that the restrictions were necessary and proportionate to achieve that aim.

7.5 In the circumstances described above and in the absence of any other pertinent information from the State party to justify the restriction for the purposes listed in article 19 (3), the Committee concludes that the authors' rights under article 19 (2) of the Covenant were violated.

7.6 The Committee notes the author's allegations that during the court hearings he was not allowed to cross-examine the police officers whose statements were the only evidence against him, in violation of his rights under article 14 (3) (e) of the Covenant. The Committee recalls that article 14 (3) (e) guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.⁸ It also notes that protections under article 14, which are afforded to defendants in criminal cases, also apply to persons charged with administrative violations, which might lead to imposition of sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.⁹ In the absence of any information from the State party as to the reasons for the refusal to allow the cross-examination of the only key witnesses, the Committee concludes that the facts as presented by the author amount to a violation of his rights under article 14 (3) (e) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the Russian Federation of articles 14 (3) (e) and 19 (2) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full

⁶ See, for example, *Turchenyak et al. v. Belarus*, para. 7.8.

⁷ See communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.8.

⁸ See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 39, and communications No. 1758/2008, *Jessop v. New Zealand*, Views adopted on 29 March 2011, para. 8.6 and No. 1769/2008, *Bondar v. Uzbekistan*, Views adopted on 25 March 2011, para. 7.5.

⁹ See the Committee's general comment No. 32, para. 15.

reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide the author with adequate compensation and reimbursement of any legal costs incurred by him. The State party is also under the obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present 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.
