



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3067/2017*, **

<i>Communication submitted by:</i>	Konstantin Zhukovsky (represented by counsel, Leonid Sudalenko)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	23 November 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 12 December 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	8 November 2019
<i>Subject matter:</i>	Freedom to impart information; imposition of a fine for unlawful production and distribution of mass media products; legal counsel of his own choosing
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression; fair trial
<i>Articles of the Covenant:</i>	2 (2) and (3) (b), 14 (3) (b) and (d), and 19
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The author of the communication is Konstantin Zhukovsky, a national of Belarus born in 1975. He claims that the State party has violated his rights under articles 14 (3) (b) and (d), and 19 read in conjunction with article 2 (2) and (3) (b) of the Covenant. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is represented by counsel.¹

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi.

¹ The author was not represented during the submission of his communication. The power of attorney of his counsel was signed on 12 May 2018 and was submitted with his comments to the State party's observations.



The facts as submitted by the author

2.1 The author is a freelance journalist² and a member of the Association of Journalists in Belarus. He collects information in Belarus and disseminates it on the Internet. He submits that in the course of 2016 he was systematically brought before the courts and charged with significant administrative fines because of his journalistic activities. He was convicted for the illegal production and distribution of mass media products under article 22.9 of the Code of Administrative Offences³ in relation to the following six separate incidents.

2.2 The first incident occurred on 20 November 2015. The author was interviewing and filming local residents of the town of Kalinkovichy on their views concerning the national symbols of Belarus. His video, entitled “Pahonia⁴ as a symbol of a person’s independence” was disseminated via the Internet and aired on the Polish satellite channel Belsat. Subsequently, a police report was filed against the author, charging him with a violation of article 22.9 (2) of the Belarus Code on Administrative Offences.⁵ On 14 January 2016, the Kalinkovichy District Court of the city of Gomel found the author guilty under article 17 of the law on mass media and fined him 7,350,000 Belarus roubles.⁶ On 26 February 2016, the Gomel Regional Court rejected the author’s appeal. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court, but his appeals were dismissed on 24 March and 11 May 2016, respectively. The author also filed an appeal with the Prosecutor-General of Gomel region and the Prosecutor-General of Belarus under the supervisory review procedure. His appeals were dismissed on 22 June and 14 July 2016, respectively.

2.3 The second incident occurred on 22 December 2015, when the author was interviewing and filming local residents of the village of Korma in the Gomel region regarding their living conditions and their lack of access to water. The video product, entitled “Seven thousand people with no access to water” was disseminated via the Internet and aired on the Polish satellite channel Belsat. Subsequently, an administrative record was filed against the author by the police, charging him with a violation of article 22.9 (2) of the Belarus Code on Administrative Offences. On 20 January 2016, the Korma District Court of Gomel region found him guilty under the law on mass media and fined him 6,300,000 Belarus roubles.⁷ On 12 February 2016, the author’s appeal was rejected by the Gomel Regional Court. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court, but his appeals were dismissed on 11 April and 6 June 2016, respectively. The author further filed appeals with the Prosecutor-General of Gomel region and the Prosecutor-General of Belarus under the supervisory review procedure, but his appeals were dismissed on 14 July and 1 August 2016, respectively.

2.4 The third incident occurred on 15 December 2015. The author was interviewing and filming employees of a milk factory located near the Buda-Koshelevsky district of the Gomel region on their living conditions and the difficulties they are facing with the distribution of their products. The video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. The district police filed a report, charging the author with a violation of article 22.9 of the Belarus Code on Administrative Offences. On 4 February 2016, the Buda-Koshelevsky District Court of the city of Gomel fined him 8,400,000 Belarus roubles.⁸ During the court hearing, the author stated that he wished to be

² Freelancers are not acknowledged as foreign mass media journalists and, as a result, they cannot get accreditation from the Ministry of Foreign Affairs. Article 35 (4) of the law on mass media prohibits the carrying out of journalistic activities for foreign mass media without accreditation.

³ The author contributed as a journalist to Polish Belsat, a foreign mass media company, thus violating the law as he was working without accreditation.

⁴ The pahonia was the coat of arms of the Belarusian Democratic Republic in 1918 and of Belarus from 1991 to 1995.

⁵ Article 22.9 (2) of the Belarus Code of Administrative Offences envisages liability for violating the law on mass media.

⁶ The equivalent of approximately \$381 on the day of the court ruling.

⁷ The equivalent of approximately \$310 on the day of the court ruling.

⁸ The equivalent of approximately \$390 on the day of the court ruling.

represented by S., who was a professional lawyer but not a member of the bar (a licensed advocate). The Court rejected his request on the basis of article 4.5, paragraph 2, of the Procedural Executive Code of Administrative Offences, under which only close relatives or licensed attorneys may represent defendants during administrative proceedings. The author notes in his submission that he could not afford to hire a lawyer to represent him at his administrative hearing, and that he chose S. to be his representative at the hearing because S. had agreed to do so on a pro bono basis.

2.5 On an unspecified date, the author filed a cassation appeal with Gomel Regional Court, in which he appealed against, inter alia, the refusal of the Buda-Koshelevsky District Court to allow the counsel of his choice to represent him. He argued that article 62 of the Constitution of Belarus allowed for the use of representatives other than licensed advocates during all court proceedings, and that, despite the fact that the Procedural Executive Code of Administrative Offences did not allow for representation by non-advocates in administrative courts, the court had to decide on that issue from the point of view of the Constitution. The appeal was rejected on 26 February 2016. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court, but his appeals were dismissed on 11 April and 27 May 2016, respectively. The author also appealed with the Prosecutor-General of Gomel region and the Prosecutor-General of Belarus under the supervisory review procedure, but the appeals were dismissed on 20 June and 14 July 2016, respectively.

2.6 The fourth incident occurred on 31 December 2015, when the author was interviewing and filming local residents of the town of Zhlobin regarding the problems of the local metallurgical factory. The video product, entitled “BMZ out of work and money”,⁹ was disseminated via the Internet and aired on the Polish satellite channel Belsat. Subsequently, an administrative record was filed against the author by the police, charging him with a violation of article 22.9 (2) of the Belarus Code on Administrative Offences. On 24 February 2016, the Zhlobin District Court fined him 16,800,000 Belarus roubles.¹⁰ On 20 April 2016, the Gomel Regional Court rejected the author’s appeal. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court, but his appeals were dismissed on 26 May and 13 July 2016, respectively. The author also filed an appeal with the Prosecutor-General of Gomel region and the Prosecutor-General of Belarus under the supervisory review procedure, but the appeals were dismissed on 2 and 29 August 2016, respectively.

2.7 The fifth incident occurred on 28 January 2016, when the author was interviewing and filming employers of the Mazyr distillery regarding their problems. The video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. Subsequently, the Mazyr police filed an administrative record against the author, charging him with a violation of article 22.9 of the Belarus Code on Administrative Offences. On 17 March 2016, the Mazyr District Court of the city of Gomel fined him 7,350,000 Belarus roubles.¹¹ On 13 April 2016, the Gomel Regional Court rejected the author’s appeal. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court, but his appeals were dismissed on 16 May and 8 July 2016, respectively. The author also filed an appeal with the Prosecutor-General of Belarus under the supervisory review procedure, but his appeal was dismissed on 30 August 2016.

2.8 The sixth incident occurred on 17 February 2016. The author was interviewing and filming the employees of the Red Cross, located in the town of Gomel, regarding the issues of registration and distribution of refugees from Ukraine in Belarus. The video product was disseminated via the Internet and aired on the Polish satellite channel Belsat. The Gomel city police filed an administrative record against the author, charging him with a violation of article 22.9 of the Belarus Code on Administrative Offences. On 15 April 2016, the Central District Court of the city of Gomel fined him 7,350,000 Belarus roubles.¹² During

⁹ BMZ is the acronym for the Belarussian Metallurgical Factory located in Zhlobin.

¹⁰ The equivalent of approximately \$775 on the day of the court ruling.

¹¹ The equivalent of approximately \$362 on the day of the court ruling.

¹² The equivalent of approximately \$369 on the day of the court ruling.

the court hearing, the author stated that he wished to be represented by S., who was a professional lawyer but not a member of the bar (a licensed advocate). The Court rejected his request on the basis of article 4.5, paragraph 2, of the Procedural Executive Code of Administrative Offences, under which only close relatives or licensed advocates may represent defendants during administrative proceedings. The author notes in his submission that he could not afford to hire an advocate to represent him at his administrative hearing, and that he chose S. to be his representative at the hearing because S. had agreed to do so on a pro bono basis.

2.9 On an unspecified date, the author filed a cassation appeal with Gomel Regional Court, in which he appealed against, inter alia, the refusal of the Central District Court to allow the counsel of his choice to represent him. He argued that article 62 of the Constitution of Belarus allowed for the use of representatives other than licensed advocates during all court proceedings, and that, despite the fact that the Procedural Executive Code of Administrative Offences did not allow for representation by non-advocates in administrative courts, the Court had to decide on that issue from the point of view of the Constitution. The appeal was rejected on 20 May 2016. The author appealed through the supervisory review procedure to the Chair of the Gomel Regional Court and the Chair of the Supreme Court, but his appeals were dismissed on 1 July and 19 August 2016, respectively. The author also filed appeals with the Prosecutor-General of Gomel region and the Prosecutor-General of Belarus under the supervisory review procedure, but the appeals were dismissed on 29 September and 16 November 2016, respectively.

2.10 Thus, the author contends that he has exhausted all available and effective domestic remedies.

2.11 The author submits that the police and courts failed to assess his actions within the scope of article 34 of the Constitution of Belarus, which guarantees the right to receive and disseminate information. In this context, the author argues that the authorities failed to justify whether the limitation of his rights were necessary to ensure respect for the rights or reputations of others, as well as for the protection of national security, public order, public health or morals.

2.12 The author also claims that the authorities disregarded article 2 of the law on mass media, which implies that when the rules of a treaty to which Belarus is party are not in line with the rules provided for by this law, the rules of the treaty shall apply.

2.13 The author moreover submits that the court decisions in his case were contrary to the provisions contained in the Constitution of Belarus, the law on mass media, article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

The complaint

3.1 The author claims that Belarus violated his rights under article 19 read in conjunction with article 2 (2) and (3) (b) of the Covenant. He claims that by filming videos and disseminating them, he was exercising his right to obtain and impart information without undermining public order, public interest, health, or the rights and freedoms of others.

3.2 The author also claims that Belarus failed to comply with its obligations under article 14 (3) (b) and (d) when it denied his right to legal assistance of his own choosing and when it failed to give him adequate time and facilities for the preparation of his defence and communication with counsel of his own choosing.

3.3 The author requests the Committee to recommend that the State party bring the provisions of the law on mass media and article 4.5 of the Procedural Executive Code of Administrative Offences into line with its international obligations under the Covenant.

State party's observations on admissibility and the merits

4.1 On 12 February 2018, the State party, referring to the spirit of cooperation, submitted its observations on the admissibility and the merits of the complaint and commented on each of the six incidents presented by the author. In this context, the State

party reiterates the dates and reasoning for dismissal of the author's court appeals, including those reviewed under the supervisory procedures.

4.2 The State party notes that the author's rights under article 14 of the Covenant were fully ensured, particularly with regard to a fair and public hearing by a competent, independent and impartial tribunal established by law. His sentences were reviewed by higher tribunals and according to the law.

4.3 The State party further notes that the author's claims of a violation of article 14 are unsubstantiated. It notes that this provision of the Covenant does not elaborate on the meaning of the word "counsel"; thus, the State party is not prevented from its own interpretation of this term in its national legislation while, at the same time, not contradicting the provisions of the Covenant. The State party notes that article 4.5, paragraph 2, of the Procedural Executive Code of Administrative Offences not only regulates the provision of legal assistance in administrative processes, which does not contradict the Covenant, but also ensures the realization of the right to equal protection of the law as foreseen in article 26 of the Covenant. The State party concludes that the author's request to be represented by S. was dismissed lawfully.

4.4 The State party submits that the author was convicted for unlawful production and dissemination of mass media products, in violation of article 22.9 of the Code of Administrative Offences, and he was subjected to a fine for each incident. The State party notes that the author has failed to exhaust all domestic remedies because he did not complain under the supervisory review procedure to the Chair of the Supreme Court.

4.5 The State party disagrees with the author's claims of a violation of article 19 of the Covenant. In this context, the State party notes, referring to article 29, paragraph 1, of the Universal Declaration of Human Rights, that everyone has duties to the community in which alone the free and full development of his or her personality is possible. The State party further refers to article 23 of the Constitution of Belarus, which states that no one may enjoy advantages and privileges that are contrary to the law. In this context, the State party notes that the provisions of the law on mass media that relate to regulating the activities of mass media journalists shall not be considered as an unduly limitation of the rights within the scope of article 19 of the Covenant.

Authors' comments on the State party's observations

5.1 In a letter dated 12 May 2018, the author commented on the State party's observations. He submits that he appealed the decisions under the supervisory review proceedings to the Chair of the Supreme Court of Belarus. His appeal, however, was rejected by one of the Chair's deputies. In this context, the author argues that the State party failed to explain which of the five deputies should have been addressed in order for the appeal to be reviewed by the Chair of the Court. The author submits that he does not consider the supervisory review procedures to be an effective remedy in any event.

5.2 As to the State party's argument regarding the compatibility of the limitation contained in the national legislation on the freedom of expression with those under article 19 of the Covenant, the author refers to the case law of the Committee and submits that any restriction must conform to the strict tests of necessity and proportionality, 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.

5.3 The author refers to the jurisprudence where the Committee finds it incompatible with the Covenant that the State party has given priority to the application of its national law over its obligations arising under the Covenant.¹³

5.4 The author submits that the courts failed to establish how the restrictions on his right to freedom of expression, although based on the national legislation, were necessary and fall within one of the justifications as prescribed by articles 19 (3) and 21 of the Covenant.¹⁴

¹³ *Tae Hoon Park v. Republic of Korea* (CCPR/C/64/D/628/1995), para. 10.4.

¹⁴ Although here the author refers specifically to article 21 of the Covenant, this provision was not invoked in his initial communication or in his claims therein.

5.5 The author finally reiterates his claims that Belarus failed to comply with its obligations under article 14 (3) (b) and (d) when it denied his right to legal assistance of his own choosing.

Issues and procedures before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication 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 the State party's objection that the author has failed to seek a supervisory review by the Chair of the Supreme Court of the decisions of the lower domestic courts. The Committee recalls its jurisprudence, according to which the filing of a request for supervisory review to the Chair of a court with regard to 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 provide an effective remedy in the circumstances of the case.¹⁵ In the absence of any information regarding the eventual effectiveness of supervisory review proceedings to the Supreme Court relating to cases of freedom of expression, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 As to the author's claim that the State party violated its obligations under article 14 (3) (b) of the Covenant because he did not have adequate time and facilities for the preparation of his defence and could not communicate with counsel of his own choosing, the Committee observes that the author was not in detention and has not provided information that he was otherwise precluded from preparing for his court hearing with counsel of his own choosing. Since the author did not show how his rights under article 14 (3) (b) were violated, and in the absence of any other pertinent information on file, the Committee finds that his claim under article 14 (3) (b) is insufficiently substantiated and is thus inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's claim that the State party violated his right to defend himself through legal assistance of his own choosing, the Committee notes the author's allegation that the Procedural Executive Code of Administrative Offences violates his right under 14 (3) (d) of the Covenant by restricting his right to legal assistance in administrative cases to only close relatives or licensed attorneys, while the Constitution of Belarus provides for the right to use attorneys and other representatives in courts. However, the Committee observes that in the absence of any other pertinent information on file, the Committee finds that his claim under article 14 (3) (d) is insufficiently substantiated and thus inadmissible under article 2 of the Optional Protocol.

6.6 The Committee further notes the author's claim that his rights under article 19, read in conjunction with article 2 (2), of the Covenant were violated. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.¹⁶ The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of his rights

¹⁵ *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998), para. 7.4; and *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3.

¹⁶ *Poliakov v. Belarus* (CCPR/C/111/D/2030/2011), para. 7.4.

under article 19, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider that an examination of whether the State party also violated its general obligations under article 2 (2) of the Covenant, read in conjunction with article 19, to be distinct from the examination of the violation of the author's rights under article 19. 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.

6.7 The Committee also considers that the author has failed to substantiate his claims raised under article 19, read in conjunction with article 2 (3), of the Covenant and therefore declares this part of the communication inadmissible.

6.8 The Committee considers that the author has sufficiently substantiated the remaining claims under article 19 of the Covenant for the purpose of admissibility. It therefore declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that the courts failed to establish how the restriction on his right to freedom of expression fell within one of the permissible restrictions as prescribed under article 19 (3) of the Covenant. The Committee also notes the author's claim that, in the absence of such justifications, his rights under article 19 (2) of the Covenant were violated.

7.3 The Committee recalls in that respect its general comment No. 34 on the freedoms of opinion and expression, in which it points out, inter alia, that the freedom of expression is essential for any society and a foundation stone for every free and democratic society.¹⁷ It notes that article 19 (3) allows restrictions on the freedom of expression, including the freedom to impart information and ideas, only to the extent that they are provided by law and only if they are necessary (a) for respect of the rights and reputation of others, or (b) for the protection of national security or public order (*ordre public*), or of public health or morals. Finally, any restriction on freedom of expression must not be overbroad in nature – that is, it must be the least intrusive among the measures that might achieve the relevant protective function and must be proportionate to the interest to be protected.¹⁸ The Committee recalls that it is for the State party to demonstrate that the restrictions on the author's rights under article 19 of the Covenant were necessary and proportionate.¹⁹

7.4 The Committee notes that the author was sanctioned for filming local residents and distributing video materials via the Internet and through a foreign satellite channel on six separate incidents without a valid accreditation. In all these instances, the author was heavily fined by local courts for illegal production and distribution of mass media products in violation of the law on mass media. The Committee further notes that neither the State party nor the domestic courts have provided any explanations as to how such restrictions were justified pursuant to the conditions of necessity and proportionality as set out in article 19 (3) of the Covenant, and whether the penalties imposed (i.e. the administrative fines), even if based on law, were necessary, proportionate and in compliance with any of the legitimate purposes listed in the mentioned provisions. In these circumstances and in the absence of any explanations by the State party, the Committee concludes that the rights of the author under article 19 (2) of the Covenant, have been violated.

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 State party of article 19 (2) of the Covenant.

9. Pursuant to 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 reparation to

¹⁷ General comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

¹⁸ *Ibid.*, para. 34.

¹⁹ *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3.

individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to take appropriate steps to reimburse any expenses incurred by the author and to provide him with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future, in particular by reviewing its national legislation and the implementation thereof in order to make it compatible with its obligations to adopt measures able to give effect to the rights recognized by article 19.²⁰

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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

²⁰ *Mikhalchenko v. Belarus* (CCPR/C/114/D/1982/2010), para. 10.