



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. 2308/2013*, **

<i>Communication submitted by:</i>	Ruslan Dzhumanbaev (represented by counsel, Bakhytzhan Toregozhina)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	13 June 2013 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 4 December 2013 (not issued in document form)
<i>Date of adoption of Views:</i>	29 March 2019
<i>Subject matter:</i>	Sanction for participating in a peaceful assembly
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of expression; freedom of assembly
<i>Articles of the Covenant:</i>	19 (2) and 21
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

* Adopted by the Committee at its 125th session (4–29 March 2019).

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



1. The author of the communication is Ruslan Dzhumanbaev, a national of Kazakhstan born in 1974. He claims that the State party has violated his rights under articles 19 (2) and 21 of the Covenant. The Optional Protocol entered into force for Kazakhstan on 30 September 2009. The author is represented by counsel.

The facts as submitted by the author

2.1 On 2 June 2012, the author encountered some friends in the centre of Almaty, near the statue of the poet Abay Kunanbayev, a direct ancestor of the author. They discussed Mr. Kunanbayev's poetry and the tragic events that took place on 16 December 2011 in Zhanaozen. They did not have any microphones or banners in their possession and their meeting was of an informal nature.

2.2 At some point, the group was approached by a representative of the prosecutor's office, who informed them that they were violating the law on organizing and holding peaceful assemblies, meetings, marches, pickets and demonstrations. Upon his advice, the author and his friends decided to walk away from the statue so they would not be breaking the law.

2.3 On the same day, the author was arrested by the police and tried by the specialized inter-district administrative court of Almaty. The author testified that he was only meeting friends to discuss poetry and the events in Zhanaozen and thus exercising his freedom of opinion and expression. The court found the author guilty of violating the above-mentioned legislation on organizing and holding peaceful assemblies and sentenced him to a fine of T32,360.¹

2.4 The author learned from the trial transcript that the Akimat² of Almaty had earlier denied an application for a public meeting by a leader of the political party Azat, B.M. Abilov, planned for the same day, the same time and at the same place. The author maintains that he is not a member of the Azat party and did not have any relation to the planned event.

2.5 On 11 June 2012, the author submitted an appeal to the appellate court of Almaty. He stated that the administrative court did not take into account that the meeting in which he participated was of a peaceful nature, did not violate the rights of others, and had no relation to the meeting planned by Mr. Abilov. On 19 June 2012, the appellate court confirmed the decision of the court of the first instance and dismissed the appeal. The appellate court found that the administrative court had acted in accordance with the law, had correctly assessed facts and evidence and had imposed an appropriate sanction.

2.6 On 5 July 2012, the author petitioned the Office of the Prosecutor General for supervisory review of the administrative court's decision. On 17 July 2012, the Deputy Prosecutor General denied his petition for supervisory review.

The complaint

3. The author claims that the State party has violated his rights to freedom of expression, under article 19 (2) of the Covenant, and to peaceful assembly, under article 21 of the Covenant, as neither the police nor the courts provided a valid justification for restricting those rights.

State party's observations on admissibility

4.1 The State party sent the Committee a note verbale dated 28 January 2014. In it, the State party requests the Committee to find the communication inadmissible due to non-substantiation and failure to exhaust domestic remedies. The State party states that on 2 June 2012, the author, with about 25 other people, took active part in an unauthorized gathering to discuss the events in Zhanaozen. In his public speech the author talked about the poverty of the rural population, corruption and other topics. The event was covered by several mass media outlets. The State party notes that the author's actions violated article 9

¹ Equivalent of approximately \$211 in 2013.

² Equivalent of a mayor's office (municipal, district or provincial government).

of the law on organizing and holding peaceful assemblies, meetings, marches, pickets and demonstrations. On the same day, the author was found guilty by the specialized inter-district administrative court of Almaty of an administrative offence under article 373, paragraph 1 (violation of the legislation on organizing and holding peaceful assemblies), of the Code on Administrative Offences of Kazakhstan, and fined T32,360.

4.2 The State party further notes that the author does not deny that he took part in the unauthorized gathering on 2 June 2012, but that he argues that his actions have not violated the law. Article 19 (3) of the Covenant allows for certain restrictions on the right to freedom of expression if they are provided by law and are necessary for the respect of the rights or reputations of others, or for the protection of national security or public order, public health or morals. Similarly, article 21 provides for the right to peaceful assembly, and no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society 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 State party notes that in Kazakhstan, the law on organizing and holding peaceful assemblies, meetings, marches, pickets and demonstrations sets the procedure for expressing opinion in public places and restrictions on that right. According to the law, one must submit an application to a local municipality to hold a public event, and those in violation of this requirement can be held responsible in accordance with the legislation. The State party submits that there were no permits issued by the local municipal body for the gathering attended by the author.

4.3 The State party recognizes that freedom of assembly is a democratic exercise of political activism, and that the Constitution of Kazakhstan guarantees the realization and protection of this inalienable right. However, it notes that the realization of rights by some must not lead to the violation of rights of others. It refers to the guidance of the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe, which recognizes the necessity of restrictions on and exceptions to the exercise of the right to peaceful assemblies. The State party notes that all developed democratic countries restrict the right to peaceful assembly through laws that provide specific conditions for its realization. According to the State party, in recent years, European countries have incurred billion-dollar losses from parts of society exercising its right to peaceful assemblies, namely as a result of, among other things, numerous riots, destruction of public and private property and stoppage of factories. Thus, to ensure the rights and freedoms of others, public safety, the normal functioning of transport and the preservation of infrastructure, local governments in Kazakhstan have identified designated areas where non-State public events can be held.

4.4 The State party notes that the author has been sanctioned not for expressing his opinion but for violating the procedure for holding a public assembly. His claim that he did not commit an unlawful action has been considered by the trial and appellate courts and found to be unsubstantiated.

4.5 The State party further acknowledges that there is no connection between the author's unauthorized gathering and the request by Mr. Abilov to hold a public meeting at the same time and place.

4.6 With regard to the exhaustion of domestic remedies, the State party submits that the Code of Administrative Offences provides for a supervisory review procedure, which allowed the author to submit a petition to the Office of the Prosecutor General requesting a review of his case. The author submitted such a petition to the Deputy Prosecutor General, which was denied on 6 June 2013. However, he did not petition the Prosecutor General for supervisory review. Therefore, the State party considers that the author has not exhausted all available domestic legal remedies and that his communication should be found inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

Author's comments on the State party's observations

5.1 In a letter dated 20 February 2014, the author responded to the observations of the State party. The author refers to the *Guidelines on Freedom of Peaceful Assembly* of 2007, issued by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe and accepted by Kazakhstan and other members of the Organization, which set out six guiding principles for the regulation of peaceful assemblies. He submits that all of those principles have been violated by the State party. He also submits that, although article 10 of the law on organizing and holding peaceful assemblies, meetings, marches, pickets and demonstrations allows local authorities to regulate the procedure of a peaceful assembly, it does not grant them power to determine places where assemblies are to take place, and especially to limit them to just one location. The author also submits that in its decision No. 167 of 29 July 2005, the local council of Almaty City recommended that the city mayor use the city's main square for official State-funded events, to use the square behind a local movie theatre for events organized by non-governmental organizations, and all other squares for official and entertainment events. The author argues that this decision is not formally based in law and is inconsistent with international human rights law because it effectively restricts the freedom of peaceful assembly. He also argues that the decision discriminates on the basis of people's political views.

5.2 With regard to the exhaustion of domestic remedies, the author submits that he has already petitioned the Office of the Prosecutor General for supervisory review. He therefore considers the domestic remedies to be exhausted.

Further observations by the State party on admissibility

6. By a note verbale dated 30 April 2014, the State party reiterated its position that the Committee should find the communication inadmissible due to non-substantiation and failure to exhaust domestic remedies.

Author's comments on the State party's further observations

7. In a letter dated 30 May 2014, the author notes that in its observations the State party has admitted that he was charged with an administrative offence for participating in a peaceful assembly. He claims that his rights have been restricted based on a by-law passed by the local council, which is of a recommendatory nature and violates the Constitution of Kazakhstan and international standards. The author notes that in accordance with paragraph 35 of the Committee's general comment No. 34 (2011) on the freedoms of opinion and expression, when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken. However, the gathering of 2 June 2012 cannot be characterized as a threat because it was peaceful and did not violate the public order or the rights of others. The author notes that the State party, in claiming that the restriction of the author's rights was necessary, has not indicated which ground listed in article 19 (3) it is relying upon to make such a claim.

Issues and proceedings before the Committee*Considerations of admissibility*

8.1 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.

8.2 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.

8.3 The Committee notes the State party's argument that the author has failed to file a petition for supervisory review to the Prosecutor General. The Committee recalls its jurisprudence according to which a petition to a prosecutor's office requesting 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 (2) (b) of the Optional Protocol.³ In the present case, the Committee notes the author's claim that on 5 July 2012, he petitioned the Office of the Prosecutor General for supervisory review of his administrative case. The request was denied, however, by the Deputy Prosecutor General on 17 July 2012. The Committee considers that the State party has not demonstrated that a further petition for supervisory review to the Prosecutor General would have been an effective remedy in this case. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

8.4 The Committee considers that the author has sufficiently substantiated his claims under articles 19 and 21 of the Covenant, for the purposes of admissibility. Accordingly, it declares the communication admissible and proceeds with its consideration of the merits.

Considerations of the merits

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's claim that the State party has violated his right to freedom of expression and his right of peaceful assembly because he was sentenced to a fine for participating in a peaceful public gathering in Almaty on 2 June 2012. The Committee considers that the State party imposed limitations on the author's rights, in particular on his right to impart information and ideas of all kinds, as prescribed under article 19 (2) of the Covenant. Therefore, the Committee must determine whether the restrictions imposed on the author's rights can be justified under article 19 (3).

9.3 The Committee refers to its general comment No. 34, in which it states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society and that they constitute the foundation stone for every free and democratic society (para. 2). The Committee recalls that article 19 (3) of the Covenant allows certain restrictions but only as are provided by law and are necessary: (a) for the respect of the rights or reputations of others; and (b) for the protection of national security or of public order, or of public health or morals. Any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.⁴ The Committee further 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.⁵

9.4 The Committee notes that the author was sanctioned for participating in a public event on 2 June 2012 based on determinations by local courts that the events had been held without prior authorization, in violation of the law on organizing and holding peaceful assemblies, meetings, marches, pickets and demonstrations. The Committee notes differing accounts of the event. By the author's account, the event was informal in nature and discussions were limited to poetry and recent events in Zhanaozen. It involved himself and a group of friends who immediately left after being told by law enforcement officials that his actions violated the law. The Committee also notes the State party's account that the author's event was covered by several mass media outlets and involved the active participation of approximately 25 other people. The State party claims that the author's public discussion of recent events in Zhanaozen addressed the poverty of the rural population and corruption, among other topics, which has not been refuted by the author.

³ *Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 8.4; *Lozenko v. Belarus* (CCPR/C/112/D/1929/2010), para. 6.3; *Sudalenko v. Belarus* (CCPR/C/115/D/2016/2010), para. 7.3; *Poplavny and Sudalenko v. Belarus* (CCPR/C/118/D/2139/2012), para. 7.3.

⁴ General comment No. 34, para. 22; *Turchenyak et al. v. Belarus* (CCPR/C/108/D/1948/2010 and Corr.1), para. 7.7; *Korol v. Belarus* (CCPR/C/117/D/2089/2011), para. 7.3; *Poplavny and Sudalenko v. Belarus*, para. 8.3.

⁵ *Androsenko v. Belarus* (CCPR/C/116/D/2092/2011), para. 7.3; *Poplavny and Sudalenko v. Belarus*, para. 8.3.

9.5 The Committee observes that, in the present case, the State party has argued that article 19 (3) allows for certain restrictions on the right to freedom of expression if they are provided by law and are necessary for the respect of the rights of others, protection of national security or public order, public health or morals. The Committee further observes that regardless of the nature or the contents of the author's discussions during the event on 2 June 2012, the State party has failed to clearly invoke any specific grounds to support the necessity of the restrictions imposed on the author as required under article 19 (3) of the Covenant.⁶ Moreover, in its submissions the State party has not provided any information that would justify restriction of the author's right to freedom of expression. The Committee considers that, in the circumstances of the case, the limitations on the author's rights, although imposed on the basis of domestic law, were not shown to be justified and proportional pursuant to the conditions set out in article 19 (3) of the Covenant. It therefore concludes that the author's rights under article 19 (2) of the Covenant have been violated.⁷

9.6 Regarding the author's claim under article 21 of the Covenant, the Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a human right that is essential for public expression of an individual's views and opinions and is indispensable in a democratic society. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience. No restrictions to the right to peaceful assembly are permissible, unless they (a) are imposed in conformity with the law; and (b) are necessary in a democratic society in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right rather than imposing unnecessary or disproportionate limitations on it. The State party is thus under an obligation to justify the limitation of the right protected by article 21 of the Covenant.⁸

9.7 The Committee notes the State party's submission that the Constitution of Kazakhstan guarantees the protection of the right to peaceful assembly, and that the realization of this right can be restricted to ensure the rights and freedoms of others, public safety, the normal functioning of transport and the preservation of infrastructure. However, the Committee observes that in the present case the State party has failed to provide any justification or explanation as to how, in practice, the author's meeting would have violated 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, as set out in article 21 of the Covenant. Accordingly, the Committee concludes that the facts before it also constitute a violation of the author's rights under article 21 of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of the author's rights under articles 19 (2) and 21 of the Covenant.

11. 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 individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide the author with adequate compensation, including reimbursement of the present value of the fine and any legal costs or other fees incurred by him. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this connection, the State party should review its legislation pertaining to the freedom of expression and peaceful assembly, including the law on organizing and holding peaceful assemblies, meetings, marches, pickets and demonstrations, as it was applied in the present case, with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.

⁶ *Toregozhina v. Kazakhstan* (CCPR/C/112/D/2137/2012), para. 7.5; *Zhagiparov v. Kazakhstan* (CCPR/C/124/D/2441/2014), para. 13.4.

⁷ *Toregozhina v. Kazakhstan*, para. 7.5; *Zhagiparov v. Kazakhstan*, para. 13.4.

⁸ See *Poplavny v. Belarus* (CCPR/C/115/D/2019/2010), para. 8.4.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant 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 to have them widely disseminated in all official languages in the State party.
