



**International Covenant on
Civil and Political Rights**

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Human Rights Committee
Ninety-eighth session
8 to 26 March 2010

Views

Communication No. 1312/2004

<u>Submitted by:</u>	Rustam Latifulin (represented by counsel, Yuriy Shentsov)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Kyrgyzstan
<u>Date of the communication:</u>	28 June 2004 (initial submission)
<u>Documentation references:</u>	Special Rapporteur's rule 92/ 97 decision, transmitted to the State party on 21 September 2004 (not issued in document form)
<u>Date of adoption of Views:</u>	10 March 2010

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Unfair trial, unlawful detention
<i>Procedural issues:</i>	Non-substantiation, inadmissibility <i>ratione materiae</i> , evaluation of facts and evidence
<i>Substantive issues:</i>	Right to a fair trial, right to immediate access to a lawyer, unlawful constraint measure, right to be promptly informed of the charges, conviction for failing to fulfil contractual obligations
<i>Articles of the Covenant:</i>	2, 9, paragraphs 1 and 2, 11, 14 paragraphs 1 and 3 (c and d), and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

On 10 March 2010, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1312/2004.

[Annex]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (Ninety-eighth session)

concerning

Communication No. 1312/2004**

Submitted by: Rustam Latifulin (represented by counsel, Yuriy Shentsov)

Alleged victim: The author

State party: Kyrgyzstan

Date of the communication: 28 June 2004 (initial submission)

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

Meeting on 10 March 2010,

Having concluded its consideration of communication No. 1312/2004, submitted to the Human Rights Committee by Mr. Rustam Latifulin 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, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Rustam Latifulin, a citizen of Kyrgyzstan, whose claims allege him to be the victim of violations by the State party of articles 2; 9, paragraphs 1 and 2; 11; 14, paragraphs 1 and 3 (c and d); and 26 of the Covenant. He is represented by counsel, Yuriy Shentsov.

The facts as presented by the author

2.1 From 1999 to 2001 the author worked as the director of the “People’s Friendship Foundation”, which provided assistance to Kyrgyz citizens wishing to work or study abroad. The Foundation had a license issued by the Ministry of Labor to carry out such

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

activities and offered no guarantees, but assistance and support in finding a job or studying abroad.

2.2 On 7 June 2002, the author was detained as a suspect of assault under section 112 of the Criminal Code. He appealed the decision regarding his detention up to the Supreme Court with no avail. On 19 June 2002, the author was charged with fraud in connection with his activities in the Foundation under section 166 of the Criminal Code, and on 20 March 2003, he was convicted by the Pervomaisk District Court of fraud (section 166, paragraph 3 (2 and 4)), theft of property (section 169), and assault (section 112, paragraph 1). He was sentenced to a total of 12 years of imprisonment with confiscation of property at a colony of strict regime. On 17 April 2003, the author filed an appeal with the Bishkek City Court, which upheld the sentence on 22 August 2003. An application for supervisory review was filed with the Supreme Court, however not by the author or his representatives, but by one of the victims who believed that the real perpetrators had escaped justice. This application was dismissed on 2 March 2004. According to the author, the Supreme Court examined the case four and a half months late, in his absence and the absence of his lawyer, despite the fact that under the Criminal Procedure Code, it has to examine within one month.

2.3 The author did not commit fraud as he had warned his clients that he could not guarantee their visas. The court failed to assess the role of one Bazarbaev, a former head of the foundation, who allegedly determined the fees to be charged to clients. The court also ignored the fact that many clients were successfully sent abroad to work or to study and it did not question the legality of the Foundation's activities.

2.4 The court made mistakes in establishing the fees that the victims had been charged and claims that all payments were sent to the Foundation's account. The author refers to the court's finding that the deputy head of the Foundation, Mr. Gladilin had withdrawn a large sum of money from the Foundation's account under the author's instruction and submits that he knew nothing about this withdrawal and that the court failed to investigate how the money had been spent. Allegedly, Mr. Gladilin had used blank papers that the author had signed, while he was in hospital so that Mr. Gladilin could send letters on the author's behalf to partner organizations. No inquiries were conducted in this regard. The author had no role in the financial aspects of the Foundation and that, at worst, he was in breach of contract. He states that several of those allegedly defrauded testified in his defense.

2.5 The author was not given access to a lawyer for a period of three days after his arrest. He states that his detention per se was unlawful, as the offence in question at the time, assault, was not one for which a restraint measure was prescribed by law. The charge of fraud under section 166 of the Criminal Code was added only after he had appealed his detention. He was not charged with any offence for a period of 10 days, and he was not advised of his right to challenge his detention. He claims that under section 102 of the Criminal Procedure Code the constraint measure is applied, if there is a ground to assume that the accused or defendant will hide from the investigation or court proceedings or will obstruct objective investigation or court proceedings. There is no evidence in his file that he hid from the investigation and, furthermore, the investigator was aware his address. The author challenged the lawfulness of his detention in the District Court on 19 June 2002. The court justified the constraint measure stating that the investigation could not locate the author at the place of his residence and that he had failed to notify the court about his new address and change in his employment status. He appealed twice in the Supreme Court on 4 July 2002 and 22 October 2002. The appeals were dismissed in his absence and in the absence of his lawyer on 7 October 2002 and 13 November 2002 respectively.

2.6 The trial court failed to examine documentary evidence by the defense and relied on the testimonies of victim Kushueva, who testified only during the pre-trial investigation and

not during the trial. The author's lawyer's request that the court hear witnesses who could testify in his favor was dismissed.

2.7 The appeal court also failed to examine either documentary evidence or witness testimonies, and thus upheld his sentence.

The complaint

3.1 The author claims a violation of article 9, paragraph 2 of the Covenant, as he was not charged with any offence for a period of 10 days, and he was not advised of his right to challenge his detention.

3.2 As to the author's claim that his arrest was unlawful, as the offence in question at the time, assault, was not one for which constraint measure was prescribed by law and his claim that the charge of fraud was added when he had appealed his detention, the Committee notes that these allegations may raise issues also under article 9, paragraph 1, of the Covenant.

3.3 The author claims that his rights under article 11 were violated, as he was imprisoned for failure to fulfill a contractual obligation.

3.4 The author claims that the Court showed bias towards him generally, as it did not take into account that other persons were responsible for the financial matters of the foundation. Furthermore the court refused his lawyer's requests to examine certain witnesses, including persons whom the organization had successfully sent abroad to work. The author claims that these facts constitute a violation of article 14, paragraph 1, of the Covenant.

3.5 The author claims to be a victim of violation of article 14, paragraph 3(d), as the hearing in the Supreme Court was held in his absence and the absence of his lawyer. He claims violation of article 14, paragraph 3 (c) as there was a delay in review of his case by the Supreme Court. He also claims violation of articles 2, and 26.

State party's observations

4.1 On 22 November 2004, the State party submits that the author was convicted of assault under section 112 and theft of property under section 169 of the Criminal Code and sentenced to 12 years imprisonment with confiscation of property.

4.2 It submits that the author's guilt was proven by the statements of victims Sadarbek G., Korchueva J., Kerimkulova A., Kushueva, Ch, Bekulova D. and other documentary evidence. The sentence was upheld by higher courts. The General Prosecutor's Office did not find any procedural violations in the author's case.

Author's comments

5.1 On 2 March 2005, the author contested the submission by the State party, stating that it did not provide any counter arguments to his claims regarding violations of the Covenant and that its conclusions were unsubstantiated.

5.2 The author claims that the State party's reference to the General Prosecutor's Office is incorrect, as the case was examined by the judicial bodies and the General Prosecutor's Office has no mandate to comment on judicial decisions.

Additional comments by the parties

6.1 On 7 June 2005, the State party submits that the General Prosecutor's Office examined the case and confirmed that the author's guilt under sections 112, 166 and 169 was proven by the statements of victims- Nusupova D., Sardarbek. G., Jenalieva M., Alkan

R., Kamchibek G., Bekulova J., Korchueva J. and statements by witnesses Jenaliev M., Osmonaliev A., Cheremisina A., and others. It was also supported by the results of a judicial expertise, audition of the Foundation and other materials of the case. The sentence was reviewed by the Supreme Court of Kyrgyzstan.

6.2 On 29 June 2005, the author submits that the State party's observations of 7 June 2005 do not contain any new information which is worth commenting. He stated that the State party is unwilling to investigate his case further and tries to delay the Committee's decision. The author asks the Committee to accelerate the examination of his case as his health is deteriorating due to depression. He claims that he has been under psychological pressure to make him withdraw his complaints to international bodies.

6.3 On 19 December 2005, the State party submits that the remaining term of 8 years, 11 months and 15 days of the author's sentence term was reduced by one fourth under the law "On amnesty" of 10 April 2004. Under section 61 of the Criminal Code his term in pre-trial detention - 1 year 2 months 15 days was deducted in the calculation of his sentence term. Thus, period of his imprisonment is counted from 7 June 2002 to 30 December 2010. His early release is possible after 14 March 2008.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

7.2 The Committee notes the author claims that his rights under article 11 were violated, as, in his view, he was imprisoned for failure to fulfill a contractual obligation. The Committee notes that the facts for which the author was tried did not concern the failure to meet a contractual obligation, but rather fell under the scope of the criminal law. Accordingly, the Committee considers that this part of the communication is incompatible *ratione materiae* with the provisions of the Covenant, and that it is therefore inadmissible under article 3 of the Optional Protocol.

7.3 The Committee notes that the author's allegations in paragraph 3.4, regarding claims under article 14, paragraph 1, largely relate to the evaluation of facts and evidence by the State party's courts. The Committee refers to its jurisprudence¹ and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not reveal that the conduct of the trial suffered from any such defects. Accordingly, the Committee considers that the author has not substantiated these allegations for purposes of admissibility and the claims are thus considered inadmissible pursuant to article 2 of the Optional Protocol.

¹ See for example: Communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995 and *P.K. v. Canada*, inadmissibility decision of 20 March 2007. Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*; No. 886/1999, *Bondarenko v. Belarus*; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision. General comment No. 32 [90] on article 14, 24 July 2007

7.4 The Committee notes the author's claims that the hearing in the Supreme Court was delayed and held in his absence and in the absence of his lawyer in violation of article 14, paragraph 3 (c and d). The Committee notes that the author did not provide sufficient information to illustrate his claims in this regard. It notes, in particular that the proceedings in question relate to a supervisory review of court decision that was already into force, and were the result of a claim filed not by the author or his representatives but by another individual. In the circumstances, the Committee declares this part of the communication inadmissible, for lack of substantiation, pursuant to article 2 of the Optional Protocol.

7.5 As to the alleged violation of articles 2 and 26 the author does not provide information to illustrate his claims in this respect. Accordingly, this part of the communication is deemed inadmissible, as insufficiently substantiated, under article 2 of the Optional Protocol.

7.6 The Committee finds that the claims relating to articles 9, paragraphs 1 and 2, of the Covenant, which the State Party has not factually disputed, have been substantiated for the purposes of admissibility.

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 provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claim that his detention was unlawful, as the offence in question at the time, assault, was not one for which a constraint measure was prescribed by law. It also notes his claim that the charge of fraud was put forward only after he appealed his detention. The materials before the Committee reveal that the court justified the detention with his failure to notify the court regarding the change of his residence and employment status. The Committee notes, however, that the State party has failed to address this matter in the context of the present communication. In the absence of any other information, the Committee concludes that there has been a violation of article 9, paragraph 1.

8.3 The Committee notes the author's claims that during the first ten days in detention he was not informed of the charges against him. The Committee notes that in its reply to the present communication, the State party has not factually disputed the claim but merely, as a general matter, stated that no procedural violations have been observed in the author's case. In the absence of any further information, the Committee finds that the facts reveal a violation of articles 9, paragraph 2, of the Covenant.

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 State party has violated articles 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, in the form of appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State 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 or not 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, the Committee wishes to receive from

the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
