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**Human Rights Committee**

 Views adopted by the Committee under article 5 (4) of
the Optional Protocol, concerning communication
No. 2900/2017[[1]](#footnote-1)\*, [[2]](#footnote-2)\*\*, [[3]](#footnote-3)\*\*\*

**Decision adopted by the Committee under the Optional Protocol, concerning communication No.2518/2014**

*Communication submitted by:* Konstantin Zhukovsky (represented by counsel, Leonid Sudalenko) (not represented by counsel)

*Alleged victim:* The author

*State party:* Belarus

*Date of communication:* 26 February 2016 (initial submission)

*Document references:* Decision taken pursuant to rule 92 of the Committee’s rules of procedure, transmitted to the State party on 15 February 2017 (not issued in document form)

*Date of adoption of Views:* 8 November 2019

*Subject matter:* Freedom to impart information; arbitrary arrest and detention; fair trial violations

*Procedural issues:* Non-substantiation of claims; exhaustion of domestic remedies; abuse of the right of submission; State party’s failure to cooperate

*Substantive issue:* Freedom of opinion and expression; deportation to Afghanistan; right to an effective remedy; fair trial – the principle of equality of arms; access to court; retrospective application of the lenient penalty

*Articles of the Covenant:* 2 (2) and (3) (b) and 19

*Articles of the Optional Protocol:* 2 and 5 (2) (b)

1.1 The author of the communication is Konstantin Zhukovsky, a national of Belarus born in 1975. He claims that the State party violated his rights under article 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.

1.2 On 12 June 2017, pursuant to rule 92 of its rules of procedure (now rule 94), the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant the author's request for interim measures and requested the State party not to extradite him to Belarus pending consideration of the communication by the Committee.

It requested the State party to refrain from deporting the author to Afghanistan while his case was under consideration by the Committee.

On 10 September 2018, the Committee, again acting through its Special Rapporteur on new communications and interim measures, decided to withdraw its request for interim measures.

 The facts as submitted by the author

 Factual background

 The complaint

 State party’s observations on admissibility

 State party’s observations on the merits

 State party’s observations on admissibility and the merits

 Author’s comments on the State party’s observations

 Author’s comments on the State party’s observations on admissibility

 Author’s comments on the State party’s observations on the merits

 Author’s comments on the State party’s observations on admissibility and the merits

 Additional submissions by the parties

 State party’s additional observations on admissibility

 State party’s additional observations on the merits

 State party’s additional observations on admissibility and the merits

 Author’s comments on the State party’s additional observations

 Author’s further comments

2. The State party asserts that the communication is inadmissible because the author has not exhausted all available domestic remedies.

It considers that the communication should be declared inadmissible because the author is not a victim of a violation of article 14 (1) and (5) of the Covenant.

It submits that the communication is incompatible with the provisions of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

With regard to the admissibility of the communication, the State party submits that the communication is not sufficiently substantiated and manifestly unfounded and therefore should be declared inadmissible pursuant to article 3 of the Optional Protocol and rule 96 (b) of the Committee’s rules of procedure (now rule 99 (b)).

The State party submits that that part of the communication should be declared inadmissible *ratione materiae*.

The State party argues that the author was provided with all of the rights and means of defence to achieve a fair trial.

3. On 23 June 2017, the author, commenting on the State party's observations, submitted that the State party had failed to address his claims.

4. The author finally 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.

**Issues and proceedings before the Committee**

 Consideration of admissibility

5. 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. 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.

7. The author claims 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.

8. The author alleges that, according to article 5 (2) (b) of the Optional Protocol, the Committee does not consider communications until it ensures that the author has exhausted all available domestic remedies.

9. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.

The Committee recalls its jurisprudence according to which the author must exhaust, for the purpose of article 5 (2) (b) of the Optional Protocol, all judicial or administrative remedies insofar as such remedies offer a reasonable prospect of redress and are de facto available to the author.

10. The Committee recalls its jurisprudence stating that, although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.

11. The Committee takes note of the author’s claim that he has exhausted all the domestic remedies available to him. In the absence of an objection by the State party, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met for the purposes of admissibility.

In the light of the foregoing, the Committee concludes that the author has exhausted all domestic remedies that can reasonably be considered available and effective, in accordance with article 14 (2) of the Convention.

The Committee notes that, in the present case, the author has exhausted all available domestic remedies, including those that constitute supervisory review proceedings, and, therefore, considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

12. The Committee takes note of the State party’s submission that the communication had been brought before the Committee by third party individuals instead of the author himself. In that respect, the Committee recalls that rule 99 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual’s representative.

13. The Committee takes note of the State party’s argument that the author has failed to file a petition for supervisory review with the Office of 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. It also considers that filing 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.

14. 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. 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 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.

15. The State party submits, therefore, that in the absence of any circumstances justifying such a delay by the author in submitting his communication to the Committee, the author’s claims under article 14 (3) of the Covenant should be declared inadmissible under article 3 of the Optional Protocol, as constituting an abuse of the right of submission.

16. The Committee thus considers that the author has failed to provide a convincing explanation for the delay in submission. In the absence of such an explanation, the Committee considers that submitting the communication after such a long lapse of time constitutes an abuse of the right of submission. Therefore, the Committee finds the communication inadmissible under article 3 of the Optional Protocol and rule 99 (c) of the Committee’s rules of procedure.

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

18. The Committee considers that the author has sufficiently substantiated the remaining claims under article 19 of the Covenant for the purpose of admissibility, and therefore proceeds with the consideration of the merits.

 Consideration of the merits

19. 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.

20. The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it referred to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there were substantial grounds for believing that there was a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant. The Committee has also indicated that the risk must be personaland that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. All relevant facts and circumstances must be considered, including the general human rights situation in the author’s country of origin.

21. The Committee recalls its jurisprudence that considerable weight should be given to the assessment conducted by the State party, and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such risk exists, unless it is found that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.

22. In accordance with article 2 (1) of the Covenant, in which it is established that States parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, the State party is under an obligation to proceed to a review of the author's case taking into account the State party's obligations under the Covenant and the present Views of the Committee. The State party is also requested to refrain from expelling the author while his request for asylum is being reconsidered.

23. The Committee refers to paragraph 2 of its general comment No. 34 (2011) on the freedoms of opinion and expression, in which it states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and that such freedoms are essential for any society. They constitute the foundation stone for every free and democratic society. The Committee recalls that article 19 (3) of the Covenant allows certain restrictions only as are provided by law and are necessary (a) for respect of the rights and reputation of others and (b) for the protection of national security or of public order (*ordre public*), 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. Finally, any restriction on freedom of expression must not be overly broad 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. 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.

24. 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.

25. 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 of the Covenant.

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, alone and read in conjunction with article 2 (2) and (3) (b), of the Covenant.

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 Mr Zhukovsky’ s rights under article 19, alone and read in conjunction with article 2 (2) and (3) (b), of the Covenant.

26. 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 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 in the future. In that regard, the Committee reiterates that, pursuant to its obligations under article 2 (2) of the Covenant, the State party should review its legislation with a view to ensuring that the rights under articles 19 and 21 of the Covenant may be fully enjoyed in the State party.

27. 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.

28. The Human Rights Committee therefore decides:

 (a) That the communication is inadmissible under articles 3 and 5 (2) (b) of the Optional Protocol;

 (b) That this decision shall be transmitted to the State party and to the author of the communication.

1. \* Adopted by the Committee at its 128th session (2–27 March 2020). [↑](#footnote-ref-1)
2. \*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, 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. In accordance with rule 108 of the Committee’s rules of procedure, Ilze Brands Kehris did not participate in the examination of the communication. [↑](#footnote-ref-2)
3. \*\*\* A joint opinion by Committee members Christof Heyns and Photini Pazartzis (dissenting) (partially dissenting) (concurring) (partially concurring) (partly concurring, partly dissenting) is annexed to the present Views. [↑](#footnote-ref-3)