



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. 2309/2013*,**

<i>Communication submitted by:</i>	Anar Abildayeva (represented by counsel Bakhytzhan Toregozhina)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Kazakhstan
<i>Date of communication:</i>	5 July 2013 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 December 2013 (not issued in document form).
<i>Date of adoption of Views:</i>	29 March 2019
<i>Subject matter:</i>	Sanctioning of the author for participation in a peaceful assembly.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims.
<i>Substantive issues:</i>	Freedom of opinion and expression; freedom of assembly.
<i>Articles of the Covenant:</i>	19 and 21
<i>Article of the Optional Protocol:</i>	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 present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marvia V. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



1. The author of the communication is Anar Abildayeva, a citizen of Kazakhstan born in 1992. She claims that Kazakhstan violated her rights under articles 19 and 21 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for Kazakhstan on 30 September 2009.

The facts as submitted by the author

2.1 On 15 June 2012, the author with her colleagues publicly protested against the arrest earlier on the same day of theatre director Bolat Atabaev and journalist Zhanbolat Mamai. Since the protest was a spontaneous, as an urgent reaction to the arrest, no authorization was sought from the city authorities.

2.2. On 28 June 2012, the Specialized Inter-district Administrative Court of Almaty found the author guilty of an administrative offence under Article 373 (3) of the Code of Administrative Offences.¹ The Court found that the author participated in an unauthorized assembly in violation of the law on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations. Because the author has previously committed a similar offence the same year, the Court sentenced her to ten days of administrative detention.

2.3. On 4 July 2012, the author appealed to the Almaty Court of Appeals. Referring to article 19 of the Covenant, the author maintained that she was arrested only for expressing her opinion. She acquiesced to the fact that she did not respect the ten-day delay for submitting a request for authorization but argued that this was due to a necessity of an urgent reaction to the arrest of the theatre director and the journalist. She underlined that the protest was peaceful and did not present any threat to public order and security, the protection of health and morals or rights and freedoms of others.

2.4 On 5 July 2012, the Almaty Court of Appeals confirmed the decision of the Administrative Court and dismissed the author's appeal finding that she failed to obtain an authorization for the assembly as required by the law on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations. On 19 July 2012, the author submitted a request to the General Prosecutor's Office to initiate a supervisory review of the Administrative Court's decision before the Supreme Court. Her request was transmitted to the Almaty City Prosecutor's Office, and was rejected by the latter on 20 May 2013. The author submitted another request for a supervisory review to the General Prosecutor's Office on 23 May 2013. Her request was rejected on 28 June 2013.

2.5 The author submits that the authorities continue to practice a restrictive approach to freedom of expression and freedom of assembly by either prohibiting the organization of peaceful assemblies or authorizing them in specially designated remote places in suburbs. In addition, the ten days delay for an authorization of a meeting renders any spontaneous gathering reacting to urgent events impossible.

The complaint

3.1 The author claims that her unjustified arrest and sentencing to ten days of administrative detention for expressing her opinion in a peaceful assembly violated her rights under articles 19 and 21 of the Covenant.

3.2 The author asks the Committee to urge the State party to hold accountable the persons responsible for the violation of her rights and to provide her with compensation for ten days of administrative detention; to ensure that the unjustified restrictions to the freedom of assembly are removed and that the respective legislation is in line with article 21 of the

¹ Article 373. Violation of the legislation on the organization and holding of peaceful assemblies, meetings, processions, pickets and demonstrations.
Paragraph 1: Violation of the laws of the Republic of Kazakhstan on the organization or holding of meetings, rallies, marches, pickets, demonstrations or other public event, or hindering their organization or conduct, or participation in illegal gatherings, meetings, rallies, demonstrations or other public event, if these actions have no signs of a criminal offence, entails a warning or a fine for individuals of up to twenty monthly calculation indices and for officials, a fine of up to fifty monthly calculation indices. Unofficial translation, available at http://adilet.zan.kz/eng/docs/K010000155_.

Covenant; and to guarantee that the organization of peaceful assemblies does not result in punishment.

State party's observations on the admissibility and merits

4.1 By note verbale of 23 January 2013, the State party submitted its observations arguing that the communication is inadmissible and unsubstantiated under article 5(2)(b) of the Optional protocol. The State party submits that article 40 of the Administrative Offences Code provides for an exceptional procedure under which the author could have requested the Prosecutor General to initiate a supervisory review in her administrative case before the Supreme Court. By failing to resort to this procedure, the author has failed to exhaust domestic remedies.

4.2 The State party recalls that the rights enshrined in articles 19 and 21 of the Covenant are subject to certain limitations. While stating that freedom of peaceful assembly is not prohibited in Kazakhstan, the State party explains that there is a certain procedure to follow in order to carry out an assembly. The State party refers to article 2 of the Law on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations, according to which organizers should request an authorization from local executive authorities to hold an assembly. According to article 9 of this law, failure to comply with such procedural requirements entails liability. The author has not obtained such authorization. She was sanctioned therefore not for expressing her opinion but for violating the procedure for carrying out an assembly at which her opinion was expressed.

4.3 Domestic courts assessed carefully the author's claims that she did not commit any unlawful acts and found them unsubstantiated. The courts took into account the circumstances of the author's case and the sanction applied was within the limits set out in article 373 (3) of the Administrative Offences Code.

Author's comments on the State party's observations

5.1 On 20 February 2014, the author provided comments to the State party's observations. She submits that although, according to the State party, the rights under articles 19 and 21 of the Covenant are guaranteed in Kazakhstan and can only be restricted under certain circumstances, the State party did not explain why it was necessary to sanction her to ten days of administrative detention. In protest, she went on hunger strike for the duration of her detention.

5.2 The author believes that she was punished for expressing her political opinion, which was not in line with the official State policy. She claims that according to international obligations assumed by the State party, any restrictions on freedom of assembly should be proportionate and applied depending on the specific circumstances of each case, that the involvement of the authorities in the process of organization of public events should be reduced to a minimum; and that forceful ending of assemblies should be a measure of last resort. The author alleges that the State party ignores and violates these principles.

5.3 The author claims to have exhausted all available domestic remedies, including submitting to the Prosecutor General's Office a request for initiation of supervisory review before the Supreme Court.

State party's additional observations on the admissibility and merits

6. On 19 May 2014, the State party reiterated its initial observations.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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

7.3 The Committee notes the author's claim that all available domestic remedies have been exhausted. It also notes the State party's observation that the author has not requested the Prosecutor General to initiate supervisory review proceedings before the Supreme Court and has thus failed to exhaust domestic remedies. In this regard, the Committee notes that the author submitted a request for initiating a supervisory review to the Prosecutor General's office on 19 July 2012 and on 23 May 2013. Her requests were rejected by the Almaty City Prosecutor's Office on 20 May 2013 and by the General Prosecutor's Office on 28 June 2013. The Committee further recalls its jurisprudence, according to which a petition to a court or to the prosecutor's office requesting a review of court decisions that have taken effect and depend on the discretionary power of a judge or a prosecutor, 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.² The State party has not shown, however, that petitions under supervisory review procedures have been applied successfully in cases concerning freedom of expression and assembly. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

7.4 The Committee considers that the author has sufficiently substantiated her claims under articles 19 and 21 of the Covenant for the purposes of admissibility. It therefore declares them admissible and proceeds with their examination of the merits.

Consideration of the merits

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

8.2 The Committee notes the author's claim that, by sentencing her for 10 days in administrative detention for holding a peaceful assembly, the State party violated her rights to freedom of expression and freedom of assembly. The Committee also notes the State party's claim that the author was sentenced to administrative detention for organizing a public event without obtaining permission from the local authorities and not for expressing her opinion.

8.3 The Committee notes that sanctioning of the author for expressing her protest through participation in a public protest interfered with her right to impart information and ideas of any kind, as protected under article 19 (2) of the Covenant. The Committee must therefore decide whether the limitations imposed on the author are allowed under one of the restrictions laid out in article 19 (3).

8.4 The Committee refers to its general comment No. 34 (2011) on the freedom of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. Such freedoms are essential for any society and 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 only as provided by law and necessary: (a) for the 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

² See communications *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; and *Poplavny and Sudalenko v. Belarus*, (CCPR/C/118/D/2139/2012), para. 7.3, *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998), para. 7.4; No. 1851/2008, *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3., and *E.Z. v. Kazakhstan*, (CCPR/C/113/D/2021/2010), para. 7.3; and *Sviridov v. Kazakhstan* (CCPR/C/120/D/2158/2012), para. 9.3.

which they are predicated.³ The Committee recalls that any restriction on the 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 proportionate to the interest whose protection is sought. The Committee further recalls that it is up to the State party to demonstrate that the restrictions on the rights under article 19 are necessary and proportionate.⁴ The State party contends that the author violated a procedure for obtaining a permission for an assembly, but does not otherwise respond to the author's allegations. In particular, the State party does not attempt to demonstrate that the author's detention was proportionate to a legitimate government aim. The Committee considers that, in the circumstances, the prohibition imposed on the author was not justified by the State party pursuant to the conditions set out in article 19 (3) of the Covenant. It therefore concludes that the the author's rights under article 19 (2) of the Covenant have been violated.⁵

8.5 As to the author's allegations that her rights under article 21 of the Covenant were violated, the Committee recalls that the right to peaceful assembly is a fundamental human right that is essential for the public expression of an individual's views and opinions and indispensable in a democratic society.⁶ That right entails the possibility of organizing and participating in a peaceful assembly in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to that right is permissible unless it is: (a) imposed in conformity with the law; and (b) necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), 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 of peaceful assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it.⁷ The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.⁸

8.6 The Committee notes the author's claim that the State party has not justified the imposition of her administrative arrest for having participated in a peaceful, albeit unauthorized assembly, and that the ten day waiting period for authorisation of an assembly means that law does not allow for spontaneous assemblies. The Committee also notes the State party's submission that the restriction was imposed on the author in conformity with the Code of Administrative Offences and the provisions of the law on the organization and conduct of peaceful assemblies, meetings, processions, pickets and demonstrations.

8.7 The Committee notes that it has dealt with similar cases in respect of the same laws and practices of the State party in a number of earlier communications.⁹ The Committee observes, again, that the State party has not attempted to demonstrate that the author's administrative detention for participating in a peaceful public protest were necessary in a democratic society and proportionate to 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 required by article 21 of the Covenant. The State party has not demonstrated either why spontaneous assemblies are not protected. Limitations on the right in question, even if authorised by domestic law, must also be justified in terms of these criteria. For these reasons, the Committee concludes that the State party has violated article 21 of the Covenant.

³ See general comment No. 34 (2011), para. 22.

⁴ See, for example, communications *Pivonos v. Belarus*, (CCPR/C/106/D/1830/2008), para. 9.3; No. *Androsenko v. Belarus*, (CCPR/C/116/D/2092/2011), para.7.3 and *Toregozhina v. Kazakhstan* (CCPR/C/124/DR/2257/2013 and CCPR/C/124/DR/2334/2014), para. 7.5.

⁵ See general comment No. 34 (2011), para. 34.

⁶ See, for example, *Margarita Korol v. Belarus* (CCPR/C/117/D/2089/2011), para. 7.5.

⁷ See *ibid*; and *Toregozhina v. Kazakhstan* (CCPR/C/124/DR/2257/2013 and CCPR/C/124/DR/2334/2014), para. 7.3.

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

⁹ See, for example, *Toregozhina v. Kazakhstan* (CCPR/ C/124/DR/2257/2013 and CCPR/C/124/DR/2334/2014).

9. 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 the author's rights under article 19 (2) and article 21 of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide individuals whose Covenant rights have been violated 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 and reimbursement of any legal costs incurred by her. 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 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, including to organize and conduct peaceful assemblies, meetings, processions, pickets and demonstrations, may be fully enjoyed in the State party.

11. 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 or not 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 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.
