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**Human Rights Committee**

 Communication No. 2141/2012

 Views adopted by the Committee at its 115th session
(19 October-6 November 2015)

*Submitted by:* Kostenko Philippe Arkadyevich (represented by counsels, Olga Tseytlina and Sergey Golubok)

*Alleged victim:* The author

*State party:* Russian Federation

*Date of communication:* 28 February 2012 (initial submission)

*Document references:* Special Rapporteur’s rule 97 decision, transmitted to the State party on 21 Mar 2012 (not issued in a document form)

*Date of adoption of Views:* 23 October 2015

*Subject matter:* Author’s detention, trial conviction and sentencing on charges of using obscene language towards police

*Procedural issue:* Admissibility – exhaustion; admissibility-substantiation

*Substantive issues:*  Administrative arrest/detention; freedom of assembly; freedom of opinion and expression; necessary in a democratic society

*Articles of the Covenant:* 14, 19 and 21

*Article of the Optional Protocol:* 2, 5, 2 (b)

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 (115th session)

concerning

 Communication No. 2141/2012[[1]](#footnote-2)\*

*Submitted by:* Kostenko Philippe Arkadyevich (represented by counsels, Olga Tseytlina and Sergey Golubok)

*Alleged victim:* The author

*State party:* Russian Federation

*Date of communication:* 28 February 2012 (initial submission)

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

 *Meeting on* 23 October 2015,

 *Having concluded* its consideration of communication No. 2141/2012, submitted to the Human Rights Committee 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 Philippe Arkadyevich Kostenko, a Russian Federation national, born on 14 January 1985. The author claims to be a victim of violations by the Russian Federation of his rights under article 14, paragraph 3 (e), article 19, and article 21 of the International Covenant on Civil and Political Rights.[[2]](#footnote-3) The author is represented by counsels, Olga Tseytlina and Sergey Golubok.

 Factual background

2.1 The author submits that he is a human rights defender and that he is a victim of a “virulent campaign of harassment organized by the authorities”. Between 2008 and 2011 he was charged with various offences (related to spreading leaflets, placing posters, violating the order for organizing public gatherings and other forms of activism) and sentenced to fines on several occasions and to a 15 days’ jail sentence, which he served from 7 to 21 December 2011. On 21 December 2011, having served the 15 days’ sentence, the author was immediately rearrested by the police in St. Petersburg and charged with using obscene language in public. From the court decisions it appears that the author was arrested and charged in relation with events that happened on 16 October 2011. On that date the author, together with several other activists, brought food and water to a police station and attempted to deliver these to his acquaintances who were in detention. The police officers in the station refused to take the delivered goods; a verbal exchange followed; the police arrested the author and issued a police report (protocol) charging him with minor hooliganism, namely using foul language in public. On 22 December 2011, the author was brought before the Justice of Peace for Judicial circuit No153 to stand trial for the above offence. During the proceedings the Justice rejected all motions of the author, including those for adjournment of the proceedings and calling as witnesses the police officers, whose written reports were the only incriminating evidence against him. On the same day the author was convicted and sentenced again to a 15 days’ jail sentence.

2.2 On 23 December 2011, the author appealed the conviction before the Petrogradskiy District Court, alleging inter alia that the court had used in evidence statements of police officers, that he was denied the opportunity to cross-examine these officers in court and that the punishment imposed on him was disproportionate to the gravity of the offence committed and infringed his freedom of expression. The District Court dismissed the author’s appeal on 26 December 2011. On an unspecified date the author lodged an application for a supervisory review before the St. Petersburg City Court, with essentially the same arguments, which the latter rejected on 13 February 2012. The author served his sentence in full in December 2011- January 2012 in the specialized detention centre of the Chief Directorate of the Interior in St. Petersburg. At the time of submission there were two more cases pending against the author.

2.3 The author submits that even though theoretically he could petition the Supreme Court for a supervisory review, he does not consider that to be an effective remedy and makes reference to the jurisprudence of the Human Rights Committee and the European Court for Human Rights in that sense. The author contends that all available and effective domestic remedies have been exhausted.

 The complaint

3.1 The author claims that the trial against him was conducted with important breaches of procedural norms and of his constitutional and procedural rights. He maintains that even though the charges were termed administrative, the proceedings against him were criminal within the meaning of article 14 of the Covenant, as he faced and served a jail sentence. The author, who maintained that the accusations were “fake” throughout the proceedings, submits that he was refused the right to cross examine the witnesses, whose statements were the only evidence against him and maintains that the above violated his rights under article 14, paragraph 3 (e) of the Covenant. He further submits that this crucial irregularity undermined the overall fairness of the criminal proceedings against him, in violation of article 14, paragraph 1 of the Covenant.

3.2 The author further submits that, even if he had used obscene language in public, the punishment imposed on him was disproportionate to the gravity of the offence. Taking into consideration that the offence in question, as recognized by the courts, was a non-violent verbal expression, the effective jail sentence infringed the author’s rights under article 19 of the Covenant. The author refers to the Committee’s general comment No 34, in which the Committee has emphasized that any restriction of the freedom of expression must conform to the strict test of necessity and proportionality and maintains that those tests should also apply to the punishment imposed. The author makes reference to the jurisprudence of the European Court for Human Rights, according to which the imposition of imprisonment for exercising one’s freedom of expression is permitted only in cases of hate speech and incitement of violence and submits that in his case there has never been a suggestion that he had used hate speech or had incited to violence.

3.3 The author further submits that, given the context and his public profile, his imprisonment on absurd and manifestly ill-founded charges was aimed at curtailing his activism, in particular not allowing him to be physically present and participate in the peaceful protests, which were held in St. Petersburg in December 2011, in violation of his rights under article 21 of the Covenant.

3.4 The author requests appropriate remedies are provided to him by the State party, including a public apology, quashing his criminal conviction, clearing his criminal record and compensation.

 State party's observations on admissibility

4.1 On 17 August 2012 and on 17 February 2014, the State party submits that the author was found guilty of having committed an administrative offence under article 20.1, part 1 of the Code of Administrative Offences (minor hooliganism) by the 22 December 2011 ruling of the Justice of Peace for Judicial Cirquit No 153 of Sankt – Petersburg. He was convicted to 15 days of administrative detention as foreseen in the above article.

4.2 On 23 December 2011, his lawyer filed an appeal against the ruling, claiming that his rights had been violated. In particular, the appeal argued that the judge refused to postpone the case regardless of the ill health of the author. It was also stated that the defence did not have a chance to fully acquaint itself with the case file, the actions of the author did not constitute an administrative violation, the court refused to take into consideration witness statements and the punishment imposed was disproportionate to the gravity of the committed act. On 26 December 2011, the Petrogradskiy District Court of Sankt - Petersburg rejected the appeal. On 13 February 2012, the Sankt – Petersburg City Court rejected a further appeal, finding that the arguments of the defence were unfounded. The court rejected the claim that the actions of the author did not constitute an administrative violation because these claims were not confirmed by the protocol on administrative violation, which elaborated on the nature and the circumstances of the committed offence, namely minor hooliganism. The State party refers to the definition of the offence and submits that it was established that the author, while being in a public area used foul language, did not react to reprimands, expressing open disrespect of the public and therefore his behaviour was correctly qualified under article 20.1 part 1 of the Code of Administrative Offences. The claim that his right to defence had been violated was not confirmed by the case materials.

4.3 The State party notes that author did not file any further court appeals, including to the Supreme Court. It submits that under article 126 of the Constitution, article 19 of the Federal Constitutional Law “On the Judicial System” and article 9 of the Federal Constitutional Law “On the Courts of General Jurisdiction”, the Supreme Court of the Russian Federation is the highest judicial instance regarding administrative matters. Based on the above, the State party maintains that the author failed to exhaust all the available domestic remedies and therefore his communication is inadmissible under articles 2 and 5, paragraph 2 (b) of the Optional Protocol to the International Covenant on Civil and Political Rights.

 Author’s comments on the State party’s observations

5.1 On 20 September 2012, the author notes that the State party had argued that in his case there had been no infringement of the domestic legal provisions, in particular of the Code of Administrative Offences. He maintains, however, that the gist of his complaint concerned the infringement of his internationally protected human rights under articles 14, 19 (in light of the interpretation of that provision given by the Committee in its general comment No 34), and 21 of the Covenant. He regrets that the State party’s observations do not address these claims and the Covenant is not even mentioned. He submits that his allegations are unanswered by the State party and respectfully requests the Committee to rule in his favour.

5.2 Regarding the State party’s submission that he has failed to exhaust the domestic remedies, the author submits that the suggested remedy, namely a request for a supervisory review to the Supreme Court, does not constitute an effective remedy for the purposes of admissibility. He refers to the Committee’s jurisprudence in that sense[[3]](#footnote-4) and maintains that no reason had been shown by the State party to depart from that well- established case-law of the Committee.

 Issues and proceedings before the Committee

 Consideration of admissibility

6.1 Before considering any claims 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.

6.2 The Committee has ascertained, as required under article 5, paragraph 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 that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies under articles 2 and 5, paragraph 2 (b), of the Optional Protocol on the ground that the author had failed to exhaust the available domestic remedies in that he had not filed any appeals to the Supreme Court of the Russian Federation, which is the highest judicial instance regarding administrative issues. The Committee notes that the provisions of the domestic laws to which the State party is referring (namely article 126 of the Constitution, article 19 of the Federal Constitutional Law “On the Judicial System” and article 9 of the Federal Constitutional Law “On the Courts of General Jurisdiction”), do not specify any particular remedy, but merely outline the role of the Supreme Court in the domestic legal system. The Committee also notes the author’s submission that the only remaining remedy for him would be a request for a supervisory review. The Committee recalls its jurisprudence[[4]](#footnote-5) that filing requests for supervisory review to the president of a court directed against court decisions which have entered into force and depend on the discretionary power of a judge constitute 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.[[5]](#footnote-6) The State party has not shown, however, whether and in how many cases petitions to the president of the Supreme Court for supervisory review procedures were applied successfully in cases concerning the right to a fair trial or freedom of expression. In these circumstances, the Committee considers that it is not precluded by articles 2 and 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

6.4 The Committee notes author’s claim that his imprisonment on absurd and manifestly ill-founded charges was aimed at curtailing his activism, in particular not allowing him to be physically present and participate in the peaceful protests, which were held in St. Petersburg in December 2011, in violation of his rights under article 21 of the Covenant. In the absence of any further detailed and documented information in support of those allegations and as to whether they were raised in domestic proceedings, the Committee considers that that claim has been insufficiently substantiated for the purposes of admissibility, and is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The Committee declares the remaining claims under article 14, paragraph 3 (e) and article 19 of the Covenant admissible and proceeds with their examination on the merits.

 Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of author’s claims that he was detained immediately after being released from serving another sentence and charged with using foul language based solely on a protocol prepared by police officers. The Committee also notes, based on the court decisions, that the author was tried and convicted in relation with an incident, that took place on 16 October 2011, when he entered into verbal conflict with police officers while trying to deliver food to his acquaintances that were in detention. The Committee further takes note of the author’s claim that, even if he had used obscene language in public, the punishment imposed on him was disproportionate to the gravity of the offence. The issue before the Committee therefore is to consider whether the State party, by detaining and charging the author with an administrative offence and subsequently sentencing him to 15 days of imprisonment, has unjustifiably restricted his rights as guaranteed in article 19 of the Covenant.

7.3 The Committee recalls that article 19, paragraph 3 of the Covenant allows certain restrictions, but only as provided by law and necessary: (a) for respect of the rights or reputation of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. It observes that any restriction on the exercise of the rights provided for in article 19, paragraph 2, must conform to the strict test of necessity and proportionality and must be directly related to the specific need on which they are predicated.[[6]](#footnote-7)

7.4 The Committee notes the State party’s argument that the author was arrested because he had used foul language in public, in violation of article 20.1, part 1, of the Code of Administrative Offences, and that his conviction was made in accordance with the domestic law. The Committee also notes that the author alleges that he was voicing his objections to the actions of the police. The Committee observes that the arrest, conviction and sentencing of the author resulted in restriction of his freedom to express an opinion. In that connection, the Committee recalls that it is for the State party to demonstrate that the restriction imposed was necessary in the case in question for one of the legitimate purposes of article 19, paragraph 3, of the Covenant.[[7]](#footnote-8) The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.[[8]](#footnote-9) The Committee observes that, while the State party appears to imply that the author’s conviction and sentence were necessary for the protection of public order, it has not provided a justification as to why it was necessary and proportionate to re-arrest the author two months after the events and impose on him the maximum sentence provided by the law, namely fifteen days of imprisonment, which he served effectively. Even assuming that his arrest and detention, had a basis in the domestic law, and that his conviction pursued a legitimate aim, such as protecting the public order, it cannot be said that the restrictions were necessary and proportionate to achieve this aim.

7.5 In the circumstances described above and in the absence of any other pertinent information from the State party to justify the restriction for purposes of article 19, paragraph 3, the Committee concludes that the authors’ rights under article 19, paragraph 2, of the Covenant were violated.

7.6 The Committee further notes the author’s allegations that during the court hearings he was not allowed to cross-examine the police officers, whose statements were the only evidence against him in violation of his rights under article 14, paragraph 3 (e) of the Covenant. The Committee recalls that article 14, paragraph 3 (e), guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.[[9]](#footnote-10) It also notes that protections under article 14, which are afforded to defendants in criminal cases also apply to persons charged with administrative violations, which might lead to imposition of sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[[10]](#footnote-11) In the absence of any information from the State party as to the reasons for the refusal to allow the cross examination of the only key witnesses, the Committee concludes that the facts as presented by the author amount to a violation of his rights under article 14, paragraph 3 (e), of the Covenant.

8. 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 facts before it disclose a violation by the Russian Federation of article14, paragraph 3 (e), and article 19, paragraph 2 of the Covenant.

9. 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. 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 appropriate compensation and reimbursement of any legal costs incurred by him. The State party is also under the obligation to take steps to prevent similar violations in the future.

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 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 and to provide an effective and enforceable remedy in case a violation has been established, 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 the official language of the State party.

1. \* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelic, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany and Margo Waterval. [↑](#footnote-ref-2)
2. The Optional Protocol entered into force for the Russian Federation on 1 January 1992. [↑](#footnote-ref-3)
3. The author refers to communication 1866/2009, *Chebotaeva v. Russia*, Views of 26 March 2012, para 8.3, where the Committee stated “supervisory review procedures against court decisions which have entered into force constitute an extraordinary remedy, dependent on the discretionary power of a judge […] and which, thus, do not need to be exhausted for purposes of admissibility”. [↑](#footnote-ref-4)
4. Communication No. 836/1998, *Gelazauskas v. Lithuania*, para 7.4; communication No. 1851/2008, para 8.3.; *Alexander Protsko and Andrei Tolchin v. Belarus*, para. 6.5.; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility, 26 July 2011, para. 6.2 ; communication No. 2021/2010, *E.Z. v. Kazakhstan*, inadmissibility decision of 1 April 2015, para 7.3, communication No. 1873/2009, *Alekseev v. the Russian Federation*, Views adopted on 25 October 2013, at para 8.4 ; communication 2041/2011, *Dorofeev v. Russian Federation*, Views adopted on 11 July 2014, para 9.6. [↑](#footnote-ref-5)
5. See for example communication 2041/2011, *Dorofeev v. Russian Federation*, Views adopted on 11 July 2014, para 9.6; communication No. 836/1998, Gelazauskas v. Lithuania, para 7.4; communication No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility, 26 July 2011, para. 6.2 ; communication No. 1785/2008, *Oleshkevich v. Belarus*, Views adopted on 18 March 2013, para. 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1839/2008, *Komarovsky v. Belarus*, Views adopted on 25 October 2013, para. 8.3; communication No.1903/2009, *Youbko v. Belarus*, Views adopted on 17 March 2014, para. 8.3, communication No. 1929/2010, *Lozenko v. Belarus,* Views adopted on 24 October 2014, para.6.3. [↑](#footnote-ref-6)
6. Committee’s general comment No. 34 (2011) on freedoms of opinion and expression, para. 22. See also, for example, communication No. 1948/2010, *Turchenyak et al.* v. *Belarus*, Views of 24 July 2013, para. 7.7. [↑](#footnote-ref-7)
7. See, for example, communication No. 1948/2010, *Turchenyak et al.* v. *Belarus,* Views of 24 July 2013, para. 7.8. [↑](#footnote-ref-8)
8. See communication No 1128/2002, *Marques de Morais v. Angola*, Views of 29 March 2005, para 6.8. [↑](#footnote-ref-9)
9. See the Committee's General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPR/C/GC/32 (2007), para 39, communications No1758/2008, *Jessop v. New Zealand*, Views of 29 March 2011, para 8.6 and No 1769/2008, *Bondar v. Uzbekistan*, Views of 25 March 2011, para 7.5. [↑](#footnote-ref-10)
10. See the Committee's General Comment No. 32, ibid, para 15. [↑](#footnote-ref-11)