



## International Covenant on Civil and Political Rights

Distr.: General  
1 June 2015

Original: English

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### Human Rights Committee

#### Communication No. 2192/2012

##### Views adopted by the Committee at its 113th session (16 March–2 April 2015)

<i>Submitted by:</i>	N.S. (represented by counsel, Irina Birukova)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	21 August 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's decision under rules 92 and 97, transmitted to the State party on 22 August 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	27 March 2015
<i>Subject matter:</i>	Author facing extradition to Kyrgyzstan where he alleges that he will be subjected to torture
<i>Procedural issues:</i>	Admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Torture, arbitrary detention and non-refoulement
<i>Articles of the Covenant:</i>	7 and 9
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)



## Annex

### **Views of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political rights (113th session)**

concerning

#### **Communication No. 2192/2012\***

*Submitted by:* N.S. (represented by counsel, Irina Birukova)

*Alleged victim:* The author

*State party:* Russian Federation

*Date of communication:* 21 August 2012 (initial submission)

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

*Meeting on 27 March 2015,*

*Having concluded* its consideration of communication No. 2192/2012, 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 (4) of the Optional Protocol**

1.1 The author of the communication is N.S., a national of Kyrgyzstan, of Kyrgyz ethnicity, born on 4 June 1983. At the time of the initial communication, the author was detained, pending the finalization of extradition proceedings following an extradition request by Kyrgyzstan. The author claims to be a victim of violations by the Russian Federation of his rights under article 9 of the International Covenant on Civil and Political Rights. He also maintains that, if the Russian Federation proceeds with his extradition, that would constitute a violation of his rights under article 7 of the Covenant.<sup>1</sup> The author is represented by counsel.

1.2 On 22 August 2012, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures,

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\* 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 Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. The text of an individual opinion by Committee member Dheerujall Seetulsingh is appended to the present document.

<sup>1</sup> The Optional Protocol entered into force for the Russian Federation on 1 October 1991.

requested the State party not to extradite the author to Kyrgyzstan pending consideration of his communication.

### **The facts as presented by the author**

2.1 The author lived and worked in Kyrgyzstan until 2008. Between 2005 and 2008, he worked as a horse trainer in stables that were owned by a relative of former President Askar Akayev. Horses trained by him often won competitions against horses that belonged to a certain Mr. Krasnokutsky, son of one of the most prominent businessmen in Bishkek. The latter proposed that the author come and work for him. The author refused and Mr. Krasnokutsky threatened that the author would have “problems”. In 2005, Mr. Krasnokutsky was appointed assistant to the Procurator General of Kyrgyzstan. In 2006, a criminal prosecution against the author was initiated by Mr. Krasnokutsky. The police arrested the author and tortured him to make him confess to crimes that he did not commit. The author alleges that he was handcuffed and forced to sit on the floor and that a gas mask was forcibly placed on his head. One police officer held him down and another poured vinegar in the gas mask, causing the author to choke. He was beaten with sticks on the soles of his feet. The torture lasted three days. After that, the police attempted to transfer him to a pretrial detention centre, but the staff did not accept him, because of the traces of beatings on his body. He was taken to the Central Temporary Holding Facility, where he was examined by doctors and placed in quarantine for two months and 17 days. After that, he was tried and acquitted of all charges.

2.2 In 2008, the author was again arrested and accused of being a member of an organized criminal group. He was again tortured, but did not confess. He was tried for a second time, acquitted and released in the courtroom. The author subsequently understood that he would not be left alone and decided to move to the Russian Federation with his family. He settled in Moscow.

2.3 On 16 August 2011, the Ysyk-Ata District Court in Kyrgyzstan ordered the author’s arrest, in relation to charges of banditry and armed robberies by an organized criminal group. On 14 September 2011, the author was arrested in Moscow and detained on remand pending extradition. On 14 October 2011, the Butyrsky District Court ordered an extension of his detention by four months. On 11 March 2012, the Babushkin District Court extended the detention by two months. The author’s appeal against that decision was rejected by the Moscow City Court on 16 April 2012. On 4 May 2012, the Babushkin District Court extended the detention by two more months. The author’s appeal against that decision was rejected by the Moscow City Court on 13 June 2012. On 11 July 2012, the Babushkin District Court extended the detention by two more months. The author’s appeal against that decision was rejected by the Moscow City Court on 13 August 2012. In all, the detention of the author was extended by a period of one year.

2.4 The author maintains that his detention does not correspond to the requirements of article 9 of the Covenant, since it violates article 22 of the Constitution and article 108.4 of the Code of Criminal Procedure of the Russian Federation. The author refers to a decision of the Constitutional Court of the Russian Federation in a similar case,<sup>2</sup> in which it is stated that detentions should fulfil the requirements of article 22 of the Constitution and article 108.4 of the Code of Criminal Procedure, namely that decisions regarding pretrial detention should be taken in a court hearing in the presence of the accused. The author maintains that the initial ruling of the Ysykatinsky District Court of 16 August 2011, which

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<sup>2</sup> The author makes reference to Supreme Court Ruling No. 101-O, dated 4 April 2006, on the case of the Tajik citizen Nasrulloev Khabibulo.

was taken in his absence, was unlawful. He also maintains that the subsequent court reviews disregarded that fact and extended his detention regardless of his appeals.

2.5 On 24 March 2012, the Deputy Procurator General of the Russian Federation issued a ruling ordering the author's extradition to Kyrgyzstan. On 11 April 2012, the author appealed the ruling before the Moscow City Court, alleging, inter alia, that, if returned to Kyrgyzstan, he would be subjected to torture. On 25 June 2012, the appeal was rejected. On the same date, the author filed a cassation appeal before the Supreme Court, which the latter rejected on 15 August 2012.

2.6 On 6 December 2011, the author filed an application for refugee status in the Russian Federation. On 28 February 2012, the Moscow Department of the Federal Migration Service rejected his application. On 19 April 2012, the author appealed the decision before the Federal Migration Service, which rejected his appeal on 8 June 2012. On 17 July 2012, the author appealed the rejection before the Basmanny Court in Moscow. The author submits that, by the date of his initial submission to the Committee, the court had not issued a decision on that appeal, but he maintains that, in the existence of an extradition decision that has entered into force, his extradition may be carried out at any time, because of a gap in domestic legislation. He maintains that, while a ruling of the plenum of the Supreme Court of 14 June 2012 specifies that a deportation should be stayed during an appeal of a decision to deny refugee status, the above ruling is only obligatory for the courts of general jurisdiction. He maintains that the ruling is not binding upon the Office of the Procurator General and that the latter may implement the extradition order, since extraditions fall within its jurisdiction. He submits that the Russian authorities only stay executions of extradition orders in cases where an interim measures request had been issued.

2.7 The author maintains that if he is returned to Kyrgyzstan he will be immediately arrested and subjected to torture in order to be made to confess committing crimes that he did not commit. He refers to the past instances when he had been subjected to torture and refers to sources describing the systematic use of torture by the police in Kyrgyzstan.

2.8 The author contends that he has exhausted all available and effective domestic remedies.

2.9 On 8 August 2012, the author submitted an application to the European Court of Human Rights, with a request for interim measures. On 14 August 2012, the Court informed him that the interim measures request had been rejected. On 21 August 2012, the author withdrew his application to the Court.

### **The complaint**

3. The author claims to be a victim of violations by the Russian Federation of his rights under article 9 of the Covenant and maintains that, if the Russian Federation proceeds with his extradition, that would constitute a violation of his rights under article 7 of the Covenant.

### **Author's further submissions**

4.1 On 12 November 2012, the author's counsel informed the Committee that the latter had been moved to a detention centre in the Omsk region. She submitted that a refugee

status determination procedure was ongoing with regard to the author and requested that the Committee reiterate the interim measures request.<sup>3</sup>

4.2 On 10 January 2013, the author's counsel informed the Committee that, on 16 December 2012, the latter had been deported to Kazakhstan, where he was detained for five days in Petropavlovsk and then sent to Taraz with a view to his being handed over to the Kyrgyzstan authorities. Counsel submitted that she was not aware of the author's whereabouts at the time of her submission. She submitted that he had been deported despite the Committee's interim measures request and despite the fact that the refugee status determination proceeding had not been finalized. The appeals hearing against the decision to deny the author refugee status had been scheduled for 14 January 2013 before the Moscow City Court. Counsel further submits that she received a letter from the Senior Procurator from the extradition department of the General Directorate for International Legal Cooperation of the Office of the Procurator General, dated 17 January 2012, stating that, with regard to the interim measures requested by the Committee on 22 August 2012, the Committee has the right only to communicate to the State its observations regarding the desirability of such measure and that the Office of the Procurator General is not aware of any obstacles to the extradition of the author to Kyrgyzstan. The counsel submitted an appeal concerning the above letter to the Procurator General, but did not receive a response.

#### **State party's observations on admissibility and merits**

5.1 On 29 March 2013, the State party submits that, on 25 June 2012, the Moscow City Court issued a judgement confirming the 24 March 2012 ruling of the Deputy Procurator General, which ordered the extradition of the author to Kyrgyzstan. On 15 August 2012, the criminal division of the Supreme Court confirmed the Moscow City Court decision upon appeal.

5.2 On 19 October 2012, the Basmansky District Court in Moscow rejected the author's appeal against the decision of the Federal Migration Service to deny him refugee status. On 22 January 2013, the civil division of the Moscow City Court reviewed the author's appeal against the 19 October 2012 judgement, rejected the appeal and confirmed the first instance judgement. Accordingly, the first instance judgement entered into force. As at 8 February 2013, the author had not filed any requests for a supervisory review of the 25 June 2012 judgement of the Moscow City Court.

5.3 According to the Office of the Procurator General of Kyrgyzstan, at the time of the submission the author was detained in the pretrial detention centre No. 1 in Bishkek. Kyrgyzstan had presented to the State party additional guarantees that officials of the Russian diplomatic service would have the opportunity to visit the author in the places of his detention in order to control the respect of his rights.

5.4 On 2 October 2013, the State party submits that the author had been arrested on 14 September 2011, based on an extradition request from Kyrgyzstan. On 24 March 2012, the Deputy Procurator General issued a ruling for the author's extradition to Kyrgyzstan. The State party reiterates its previous submission regarding the appeals against that ruling. It further submits that, on 28 February 2012, the author's request for asylum was rejected by the Federal Migration Service. The State party submits that it has no information regarding appeals against that decision.

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<sup>3</sup> On 15 November 2012, the Committee reiterated its request to the State party not to extradite the author to Kyrgyzstan pending consideration of his communication.

5.5 On 8 August 2012, on the basis of the above facts, the author submitted an application to the European Court of Human Rights, which on 21 August 2012 informed the author that his application was inadmissible.

5.6 Regarding the admissibility of the communication, the State party refers to article 5 (2) (a) of the Optional Protocol and submits that, before submitting a communication to the Committee the author had submitted an application to the European Court of Human Rights.

5.7 The State party further submits that the author's complaint under article 9 of the Covenant is unfounded as the decisions for his detention and the extension of the detention were taken by the Russian courts in accordance with the established order and the author used his right to judicial appeal against these decisions. With regard to the author's claims of potential violations of his rights in relation to the denial to grant him refugee status, the State party notes that there is no such right under the Covenant. Therefore the above claims are incompatible with the Covenant and should be declared inadmissible under article 3 of the Optional Protocol.

5.8 Regarding the merits of the communication, the State party submits that the States parties to the Covenant have the right to control the entry of foreign citizens into their territories and their residence in accordance with the international law principles and their treaty obligations. Article 7 may be applicable to prevent deportation or extradition in cases when the risk that the individual will be subjected to cruel treatment in the receiving country originates from deliberate actions of the public authorities in that country or from deliberate actions of non-State actors, when the public authorities cannot provide the complainant with adequate protection. In order to review the case in the light of article 7, it must be established that at the moment of extradition a real risk existed that the author would be subjected to treatment contrary to article 7 of the Covenant. When determining the existence of such risk, the competent authorities take into consideration all the relevant circumstances, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The burden of proof generally falls on the author, who must present an arguable case that he or she faces a risk of treatment contrary to article 7 of the Covenant.<sup>4</sup> If such evidence is presented, the State party must fully refute it. In determining the risk of cruel treatment, one must take into consideration the foreseeable consequences of the deportation of the author to the receiving country, including the general situation in that country and the personal circumstances of the author. The State party further maintains that the mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of article 7,<sup>5</sup> but the specific allegations made by the author require corroboration by other evidence.<sup>6</sup>

5.9 The State party submits that the author's allegations of torture could not be taken as proof and were not corroborated in any way. Furthermore, Kyrgyzstan is a party to the Covenant and has its own obligations under its provisions towards the Russian Federation and the international community as a whole. Accordingly, it was not possible to conclude that there were serious grounds to believe that the author would be subjected to treatment

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<sup>4</sup> The State party refers to *Saadi v. Italy* (application No. 37201/06), European Court of Human Rights judgement of 28 February 2008, para. 129.

<sup>5</sup> The State party refers to *Vilvarajah and others v. the United Kingdom* (applications Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), European Court of Human Rights, judgement of 30 October 1991, para. 111.

<sup>6</sup> The State party refers to *Mamatkulov and Askarov v. Turkey*, (applications Nos. 46827/99 and 46951/99), European Court of Human Rights, judgement of 4 February 2005, para. 73.

contrary to article 7 of the Covenant in case of his removal to Kyrgyzstan and, therefore, in such an event, the Russian Federation would not be in violation of the Covenant.

#### **Author's comments on the State party's observations**

6.1 On 30 March 2014, the author submits that he had presented to the Committee evidence that, on 21 August 2012, he withdrew his application to the European Court and therefore at the time of the submission of his communication the same matter was not being examined under another procedure of international investigation or settlement.

6.2 Regarding his claims under article 9 of the Covenant, the author reiterates that, according to the Supreme Court rulings, detention on remand should be regulated not only by article 466 of the Code of Criminal Procedure, but also by articles 108 and 109 of that Code. Article 108 provides that whether an individual shall be detained on remand is decided by a judge in a court hearing with the mandatory participation of the suspect or the accused. In accordance with articles 5.48 and 31.2 of the Code, the courts of general jurisdiction review cases on their merits and issue decisions, as provided for in the Code. Article 108 does not allow for a court of another State to replace the Russian court in deciding the issue of detention on remand. In the author's case, the initial ruling for his detention on remand had been issued by the Butyrsky Interregional Procurator's Office, in the absence of a court order issued by a Russian court. Therefore, the Butyrsky Interregional Procurator's Office violated the legislation in force in the Russian Federation, namely article 108, paragraph 4, of the Code. The author maintains that, since the initial ruling was unlawful, the subsequent extensions of the detention on remand were also unlawful. He further points out that the repeated appeals against the decisions to extend the detention were unsuccessful and maintains that the above shows that the appeals mechanism is not an effective remedy.

6.3 The author submits that the refusal to fully investigate the consequences of the author's forced return to his country of origin in the framework of the refugee status determination procedure, during which he claimed that there is a real risk for his life and health because he could be subjected to torture or ill-treatment upon return, violated article 7 of the Covenant. The author refers to article 10, paragraph 1, of the Federal Refugees Act, according to which "a person who applies for recognition as a refugee or who has been recognized as a refugee, or has lost the status of a refugee, or has been deprived of the status of a refugee, may not be returned against his will to the territory of the State of his nationality or his former usual residence" if he corresponds to the definition of a refugee provided in article 1 of the Act. He further refers to article 10, paragraph 4, of the Act and to a ruling of the Constitutional Court<sup>7</sup> stating that the application of an individual for refugee status or asylum should lead to suspension of extradition proceedings until a final decision is taken on the issue of refugee status or asylum. The author submits, however, that the Procurator's Office issued an order for his deportation on 24 March 2012, before the deadline for appeal against the negative decision of the Federal Migration Service had expired. He further points out that the State party had violated the non-refoulement principle in a number of cases<sup>8</sup> and maintains that in practice the judicial

<sup>7</sup> Ruling of the plenum of the Supreme Court No. 11 of 14 June 2012.

<sup>8</sup> The author submits that, since October 2012, the European Court of Human Rights has found that in 12 cases rejected asylum seekers had been deported before the appeals proceeding regarding their applications had been finalized (applications Nos. 62892/12, *Karimov v. Russia*; 5614/13, *Mamadaliyev v. Russia*; 17239/13, *Mamazhonov v. Russia*; 20110/13, *Ismailov v. Russia*; 22636/13, *Nizamov v. Russia*; 24034/13, *Khakim Dzhahalbayev v. Russia*; 24334/13, *Mukhamedkhodzhayev v. Russia*; 24528/13, *Olim Dzhahalbayev v. Russia*; 34742/13, *Egamberdiyev v. Russia*; 42351/13, *Kadirzhanov v. Russia*; 47823/13, *Mamashev v. Russia*; and 50552/13, *Rakhimov v. Russia*).

review of the appeal against a decision not to grant refugee status does not have automatic suspensive effect on deportation and extradition proceedings, despite the fact that such suspensive effect is foreseen by the law.

6.4 The author further contests the State party's submission regarding the absence of information in the Russian courts about his appeal against the refusal to grant him refugee status (see para. 5.4 above). He submits that information regarding the outcome of his appeal and the text of the decision were posted on the web page of the Basmansky District Court<sup>9</sup> and the decision of the Moscow City Court following the appeal of that decision were posted on the website of that court.<sup>10</sup>

6.5 The author further maintains that, both during the extradition proceedings and during the refugee status determination proceedings, he had presented sufficient evidence to confirm his fear that in case of forcible return he would be subjected to torture or other prohibited treatment. He submits that the refugee determination procedure was conducted pro forma and that during the extradition proceedings his submissions were not examined at all, since, in the ruling ordering his extradition, there was no mention of any analysis of the above. The author further refers to the judgement of the European Court in *Yakubov v. Russia*, where, in a similar case, the European Court had ruled that, in holding that the applicant had failed to furnish "indisputable evidence" of the risk of ill-treatment, the Russian Court "had placed on him a disproportionate burden of proving the existence of a future event and had therefore, in practice, deprived him of an opportunity to obtain a meaningful examination of his claim".<sup>11</sup>

6.6 The author further refers to the 2012 report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Kyrgyzstan (see A/HRC/19/61/Add.2, paras. 27–29, 46–47, 55 and 79), and maintains that in Kyrgyzstan there is no effective system for ensuring protection against torture, no investigations of torture allegations ever take place and perpetrators enjoy impunity. Therefore, he maintains that there are no grounds to expect that the requirements of the Covenant will be respected in his case.

#### **State party's further observations on the admissibility and merits**

7.1 On 6 June and 16 July 2014, the State party submits that, on 4 October 2011, the Office of Procurator General of the Russian Federation received from the Office of the Procurator General of Kyrgyzstan an extradition request for the author dated 29 September 2011. The State party details the criminal charges listed in the extradition request. It further submits that the author was arrested on 14 September 2011 on the basis of an inter-State arrest warrant issued by Kyrgyzstan. Upon being arrested, he was advised of his rights. During the initial interrogation, the author stated that he was wanted by the Kyrgyz authorities on criminal charges and was not subjected to persecution related to political

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<sup>9</sup> The author submits a printout of the decision downloaded from the website of the Basmansky Regional Court, available from [http://basmanny.msk.sudrf.ru/modules.php?name=sud\\_delo&srv\\_num=1&name\\_op=r&delo\\_id=1540005&case\\_type=0&new=0&G1\\_PARTS\\_\\_NAMESS=&G1\\_CASE\\_\\_CASE\\_NUMBERSS=2-3516%2F2012&delo\\_table=G1\\_CASE&G1\\_CASE\\_\\_ENTRY\\_DATE1D=&G1\\_CASE\\_\\_ENTRY\\_DATE2D=&G1\\_CASE\\_\\_ORIGIN\\_DATE1D=&G1\\_CASE\\_\\_ORIGIN\\_DATE2D=&G1\\_CASE\\_\\_JUDGE=&G1\\_CASE\\_\\_RESULT\\_DATE1D=&G1\\_CASE\\_\\_RESULT\\_DATE2D=&G1\\_CASE\\_\\_RESULT=&G1\\_EVENT\\_\\_EVENT\\_NAME=&G1\\_EVENT\\_\\_EVENT\\_DATEDD=&G1\\_PARTS\\_\\_PARTS\\_TYPE=&G1\\_DOCUMENT\\_\\_PUBL\\_DATE1D=&G1\\_DOCUMENT\\_\\_PUBL\\_DATE2D=&G1\\_CASE\\_\\_VALIDITY\\_DATE1D=&G1\\_CASE\\_\\_VALIDITY\\_DATE2D=&Submit=%CD%E0%E9%F2%E8](http://basmanny.msk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=r&delo_id=1540005&case_type=0&new=0&G1_PARTS__NAMESS=&G1_CASE__CASE_NUMBERSS=2-3516%2F2012&delo_table=G1_CASE&G1_CASE__ENTRY_DATE1D=&G1_CASE__ENTRY_DATE2D=&G1_CASE__ORIGIN_DATE1D=&G1_CASE__ORIGIN_DATE2D=&G1_CASE__JUDGE=&G1_CASE__RESULT_DATE1D=&G1_CASE__RESULT_DATE2D=&G1_CASE__RESULT=&G1_EVENT__EVENT_NAME=&G1_EVENT__EVENT_DATEDD=&G1_PARTS__PARTS_TYPE=&G1_DOCUMENT__PUBL_DATE1D=&G1_DOCUMENT__PUBL_DATE2D=&G1_CASE__VALIDITY_DATE1D=&G1_CASE__VALIDITY_DATE2D=&Submit=%CD%E0%E9%F2%E8).

<sup>10</sup> Available from <http://mos-gorsud.ru/>.

<sup>11</sup> *Yakubov v. Russia* (application No. 7265/10), judgement of November 2011, para. 99.

views. Following the arrest of the author, Kyrgyzstan confirmed its intention to request extradition and transmitted a detention order for the author, issued on 16 August 2011 by the Ysyk-Ata District Court, Kyrgyzstan. On 15 September 2011, the Butyrsky Interregional Procurator Office ordered the author's detention on remand pending extradition. The legal basis for the arrest and detention of the author was article 61 of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters and on articles 108 and 466 of the Code of Criminal Procedure. Upon being arrested, the author was notified of his rights, including his right under article 46 of the Code to lodge complaints against the actions or the lack of action and decisions of the court and of the procurator.

7.2 The State party submits that, in accordance with article 125 of the Code of Criminal Procedure, the author had the opportunity to appeal before a court the measure of restraint chosen against him, but he did not do so nor did he appeal the extensions of the detention.<sup>12</sup> Under article 109 of the Code, the detention of individuals accused of especially serious crimes may not exceed 18 months. The decision to extradite the author was taken by the Office of the Procurator General on 29 March 2012, six months and 15 days after his initial arrest. Of all the decisions to extend the detention, the author appealed only the 7 September 2012 decision of the Moscow City Court to extend the detention up to 18 months. Accordingly, the State party submits that the author's claims under article 9 of the Covenant should be declared inadmissible under article 5 (2) (b) of the Optional Protocol for failure to exhaust the domestic remedies. The State party further submits that the criminal division of the Moscow City Court confirmed the 7 September 2012 decision of the Moscow City Court upon appeal by a ruling of 10 October 2012.

7.3 The State party also submits that the author appealed the 29 March 2012 decision of the Office of the Procurator General to extradite him before the Moscow City Court and that the latter rejected the appeal on 25 June 2012. On 15 August 2012, the criminal division of the Supreme Court confirmed the Moscow City Court decision upon cassation appeal. The State party maintains that the risk that the author will be subjected to torture upon return had been thoroughly assessed by the Office of the Procurator General prior to ordering his extradition. In order to verify the author's submission that he had been prosecuted illegally and subjected to torture, the Office of the Procurator General requested information from the Office of the Procurator General of Kyrgyzstan. The State party submits that the author had been subjected to criminal prosecution on three occasions for various crimes and that neither the author nor his lawyers had submitted any complaints regarding torture in Kyrgyzstan. The State party further maintains that the author's claims were thoroughly verified by the Federal Migration Service in the course of the refugee status determination procedure and that the latter rejected his refugee status application.

7.4 The State party further submits that, prior to the extradition, the Office of the Procurator General of Kyrgyzstan provided guarantees that the author's prosecution would be conducted in strict compliance with the Code of Criminal Procedure and the international obligations of Kyrgyzstan, that he would not be handed over to a third State without the prior agreement of the Russian Federation or tried or convicted for crimes not included in the initial extradition request and that, after the end of the criminal proceedings and serving his sentence, he would be allowed to freely leave the territory of Kyrgyzstan. The Office of the Procurator General of Kyrgyzstan gave assurances that the criminal prosecution against the author had no political motivation and was not related to his race or

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<sup>12</sup> The State party submits that the detention of the author had been extended by the courts on 7 November 2011 and 11 March, 4 May, 11 July and 7 September 2012.

religion, that he would not be subjected to torture or other cruel or degrading treatment and that his right to defence would be ensured.

7.5 The State party also submits that, after the author's extradition, an investigation revealed that he had participated in more crimes and that the Office of the Procurator General of Kyrgyzstan requested and received, on 13 August 2013, the permission of the Russian Federation to bring additional charges against him. The State party notes that the author is accused of common crimes and not of participation in the mass riots that took place in June 2010 and that he is of Kyrgyz ethnicity.

7.6 The State party also submits that the author filed an appeal against the 28 February 2012 decision of the Moscow Department of the Federal Migration Service almost two months later, on 20 April 2012 and that the appeal against the 8 June 2012 decision of the Federal Migration Service was filed only on 4 September 2012. The State party maintains that the above shows that the author was deliberately extending the duration of the proceedings. The State party also submits that the appeal against the 8 June 2012 decision of the Federal Migration Service was rejected on 19 October 2012 and that the above decision entered into force on 20 November 2012. The author's lawyer had missed the deadline for appeal of that decision and she applied for its restoration; her application was granted on 29 November 2012. The procurator's office was not notified of the restoration of the deadline, because it was not a party to those proceedings. Further, on 22 January 2013, the Moscow City Court rejected the appeal against the 19 October 2012 decision.

7.7 The State party refers to the European Court's judgement in the case of *Latipov v. Russia*,<sup>13</sup> in which the Court stated that the general human rights situation in a country may not be the sole ground to forbid the extradition of an individual, but that the individual claiming that he or she is at risk of torture must present further evidence. The State party maintains that the author had not presented evidence that he or his family had been subjected to cruel treatment and that the information it had regarding the criminal prosecutions against him between 2006 and 2010 do not show that the Kyrgyz justice had been harsh and unjust, nor that there were violations of the pretrial investigation procedure.

7.8 The State party further submits that the Office of the Procurator General of Kyrgyzstan provided additional guarantees for the rights of the author, namely the possibility for diplomatic representatives of the Russian Federation to visit him in the places of detention in order to control that his rights are respected. According to information from the Office of the Procurator General of Kyrgyzstan at the time of the State party's submission the author was detained in Holding Facility No. 1 in Bishkek and that he had not filed any complaints regarding unlawful methods of investigation. He was to be tried in the Ysyk-Ata District Court in the Chuisk region. Furthermore, the Ministry of Foreign Affairs of the Russian Federation organized a verification of whether the rights of the author had been respected by the Embassy of the Russian Federation in Kyrgyzstan.<sup>14</sup>

### **Issues and proceedings before the Committee**

#### *Non-respect of the Committee's request for interim measures*

8.1 The Committee notes that the State party extradited the author although his communication had been registered under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee

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<sup>13</sup> *Latipov v. Russia* (application No. 77658/11), European Court of Human Rights, judgement of 12 December 2013.

<sup>14</sup> The State party does not provide the date of the verification, the names of who participated in it or its findings.

recalls<sup>15</sup> that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination, to forward its views to the State party and to the individual (art. 5 (1) and (4)).<sup>16</sup>

8.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits serious breaches of its obligations under the Optional Protocol if its action or inaction serves to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleged that his rights under article 7 of the Covenant would be violated, should he be extradited to Kyrgyzstan. On 22 August 2012, the Committee requested the State party not to extradite the author to Kyrgyzstan pending consideration of his communication and reiterated its request on 15 November 2012. Despite that, the State party proceeded with the extradition of the author. The State party breached its obligations under the Optional Protocol by extraditing the author before the Committee could conclude its consideration and examination and the formulation and communication of its Views.

8.3 The Committee recalls<sup>17</sup> that interim measures pursuant to rule 92 of the Committee's rules of procedure, adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol. Flouting of the rule, especially by irreversible measures such as, in the present case, the author's extradition undermines the protection of Covenant rights through the Optional Protocol. In the Committee's view, these circumstances disclose a serious breach by the State party of its obligations under article 1 of the Optional Protocol.

### **Consideration of admissibility**

9.1 Before considering any claims contained in a communication, the 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.

9.2 The Committee notes the State party's submission that, before submitting a communication to the Committee, the author had submitted an application to the European Court of Human Rights. The Committee, however, observes that the author withdrew his application before the case had been examined by that Court. The Committee therefore decides that it is not precluded from examining the communication by the requirements of article 5 (2) (a) of the Optional Protocol.

9.3 The Committee takes note of the author's claim that his right under article 9 of the Covenant had been violated, since the initial ruling ordering his detention on remand had been issued by the Butyrsky Interregional Procurator's Office, in the absence of an order of a Russian court in violation of article 108, paragraph 4, of the Code of Criminal Procedure. The Committee, however, observes that the author has not presented evidence that he had

<sup>15</sup> See communication No. 869/1999, *Piandiong at al. v. the Philippines*, Views adopted on 19 October 2000.

<sup>16</sup> See communication No. 1910/2009, *Zhuk v. Belarus*, Views adopted on 30 October 2013, para. 6.2 and communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al v. Kyrgyzstan*, Views adopted on 16 July 2008, para. 10.1.

<sup>17</sup> See communication No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004.

raised that particular argument in the appeals proceedings regarding his detention before the Russian courts. Accordingly, the Committee considers that this part of the communication is inadmissible under article 5 (2) (b) of the Optional Protocol.

9.4 The Committee considers that the author has sufficiently substantiated his claims under article 7 of the Covenant, for purposes of admissibility and proceeds to their examination on the merits.

#### **Consideration of the merits**

10.1 The 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 (1) of the Optional Protocol.

10.2 The Committee notes the author's claim that, if the Russian Federation proceeds with his extradition, that would constitute a violation of his rights under article 7 of the Covenant.

10.3 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 refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant (para. 12). The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.<sup>18</sup>

10.4 The Committee observes that the author's claims that he would be subjected to torture if extradited to Kyrgyzstan were examined by the State party's Federal Migration Service, in the course of the refugee status determination proceedings and by the Russian courts in the course of the extradition proceedings, who found that he did not substantiate that he had been tortured in the past and that he would face a real, foreseeable and personal risk of being subjected to torture if returned to Kyrgyzstan. The Committee further notes that most of the evidence presented by the author relates to the general human rights situation in his country of origin rather than to his specific case. The Committee also notes the absence of any evidence establishing that the decisions of the State party's authorities were manifestly unreasonable with respect to the allegations of the author. In the light of the above, the Committee cannot conclude that the information before it shows that the author's extradition to Kyrgyzstan exposed him to a real risk of treatment contrary to article 7 of the Covenant.

11. 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 Russian Federation of its obligations under article 1 of the Optional Protocol.

12. The State party is under an obligation to avoid violations of article 1 of the Optional Protocol in the future and to comply with the requests of the Committee for interim measures.

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<sup>18</sup> See communication No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4; and communication No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.3.

## Appendix

### **Individual opinion of Committee member Dheerujlall Seetulsingh**

While I agree with the conclusions of the Committee on the non-respect of the Committee's request for interim measures (see paras. 8.1-8.3), I do not consider that this should be equated with a violation of article 1 of the Optional Protocol to the Covenant. Rule 92 of the rules of procedure of the Committee, which enables the Committee to make a request for interim measures, should ideally have been included in the Optional Protocol. It is true that interim measures are necessary to protect the human rights of the author, but non-respect of the Committee's request constitutes a breach of obligations and does not amount to a violation of the Optional Protocol. Consequently, I find that paragraph 11 is unnecessary.

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