



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2445/2014*, **

<i>Communication submitted by:</i>	D.S. (represented by counsel, Illarion Vasiliev)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	18 July 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 24 July 2014 (not issued in document form)
<i>Date of adoption of decision:</i>	23 July 2020
<i>Subject matter:</i>	Risk of torture upon extradition
<i>Procedural issue:</i>	Non-substantiation of claims
<i>Substantive issues:</i>	Non-refoulement; risk of torture upon return
<i>Article of the Covenant:</i>	7
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The author of the communication is D.S., a Kyrgyz national of Tajik ethnicity born in 1976. His asylum claim in the Russian Federation has been rejected and, at the time of submission of the present communication, he risked extradition to Kyrgyzstan. He claims that his extradition would amount to a violation by the Russian Federation of his rights under article 7 of the Covenant. The Optional Protocol entered into force for the State party on 1 January 1992. The author is represented by counsel, Illarion Vasiliev.

1.2 When registering the communication on 24 July 2014, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to grant the author's request for interim measures of protection to halt his extradition pending the consideration of his case by the Committee.

Facts as submitted by the author

2.1 On 23 April 2004, the author was found guilty under articles 247 (2) and 204 (2) of the Criminal Code of Kyrgyzstan and was sentenced to 14 years' imprisonment by the Court

* Adopted by the Committee at its 129th session (29 June–24 July 2020).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, 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.



of the Alay district of the Osh region in Kyrgyzstan. It was found that, upon a preliminary agreement with another person, the author had unlawfully acquired, stored and transported some 5.3 kg of heroin.

2.2 Thereafter, the author was transferred to a penitentiary colony in the city of Jalal-Abad. By virtue of general amnesty acts, his sanction was reduced, and he was supposed to be released on 18 July 2010.

2.3 By a decision of the Jalal-Abad City Court issued on 21 May 2008, the author was transferred to serve the remainder of his sentence in a colony settlement.

2.4 The author contends that, in September 2008, the penitentiary administration authorized his travel to Tajikistan for 15 days for him to attend his father's funeral. Given that during his stay in Tajikistan his mother passed away, the author was unable to return to Kyrgyzstan on time. When he finally tried to reach Jalal-Abad, it transpired that the border was closed due to disruptions. The author claims that he spent several weeks at the border trying to convince the border guards to allow him to cross the border, to no avail.

2.5 On 20 January 2009, he travelled to Moscow and started work on construction sites there.

2.6 On 15 May 2009, an investigator from the Service of Execution of Penalties of the Ministry of Justice of Kyrgyzstan opened an investigation regarding the author's abscondment. On the same day, a national arrest warrant was issued against him, followed by an international arrest warrant. On 2 June 2009, a criminal case for abscondment under article 336 (1) of the Criminal Code was opened against the author. On 3 June 2009, the Osh City Court ordered the author's placement in pretrial detention.

2.7 On 5 September 2013, the author was apprehended by the police in Moscow on the basis of the international warrant for his arrest. On 9 September 2013, the Court of the Babushkinsky District in Moscow ordered that the author be placed in detention; the detention was extended on several occasions. All appeals against the detention filed with the Moscow Regional Court were unsuccessful.

2.8 On 11 October 2013, the Deputy Prosecutor of Kyrgyzstan requested the author's removal from the Russian Federation. On 24 January 2014, the Deputy Prosecutor General of the Russian Federation issued a ruling authorizing the author's extradition in order for him to resume serving his sentence handed down on 23 April 2004 and also for his prosecution under article 336 (1) of the Criminal Code. The author appealed to the Moscow City Court, claiming that he feared being prosecuted in Kyrgyzstan, that he had not absconded, and that, in the event of removal, he would be subjected to torture in Kyrgyzstan, as he was an ethnic Tajik and minorities were persecuted there.

2.9 On 14 February 2014, the author applied for asylum with the Moscow office of the Federal Migration Service of the Russian Federation. On 4 March 2014, that office rejected his application, finding that he had failed to substantiate the grounds regarding his fear of persecution in the event of extradition. The author appealed that decision with the Federal Migration Service.¹

2.10 On 9 April 2014, the Moscow City Court rejected the author's appeals against the ruling of the Prosecutor General's Office allowing his extradition. On an unspecified date, the author and his counsel appealed that decision to the Supreme Court of the Russian Federation.

2.11 On 24 May 2014, the Federal Migration Service rejected the author's appeal against the negative decision issued by its Moscow office on 4 March 2014.

2.12 On 25 June 2014, the Supreme Court rejected the author's appeal against the decision of the Moscow City Court of 9 April 2014.

¹ At the time of submission of the communication to the Committee, that appeal was still pending.

2.13 Also on 25 June 2014, the author's counsel applied to the European Court of Human Rights with a request for interim measures of protection. On 26 June 2014, the European Court of Human Rights rejected the request.

2.14 The author asks the Committee to invite the State party not to proceed with his removal, pending the consideration of the communication by the Committee.

Complaint

3.1 The author claims that, as an ethnic Tajik, in the event of extradition he would be at risk of torture and other degrading treatment in order to force him to confess to crimes he has not committed, in a fabricated criminal case. According to him, minorities are discriminated against in Kyrgyzstan, as attested in several reports from international organizations. He fears for his life and health, as, according to him, torture is widespread and unpunished in Kyrgyzstan.

3.2 In support of his claim, the author notes that, in his report on his mission to Kyrgyzstan in 2011 (A/HRC/19/61/Add.2), the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment confirmed having received claims and testimonies about the widespread use of torture and cruel treatment by the Kyrgyz law enforcement authorities. Amnesty International, in its 2013 report,² also referred to the conclusions of the Special Rapporteur on torture, in particular regarding the alleged violation of the rights of ethnic Uzbeks detained and prosecuted in the context of the 2010 events, including the use of torture, forced confessions and unfair trials. The author observes that, in its 2011 "Country reports on human rights practices", the United States State Department noted that numerous defence attorneys and multiple human rights monitoring organizations, including Golos Svobody ("Voice of Liberty"), Citizens against Corruption and Human Rights Watch, continued to report many incidents of torture by the police and other law enforcement agencies throughout the year. There were persistent reports of officers beating detainees and prisoners (particularly Uzbeks in the south) to extort bribes in exchange for release or to extract criminal confessions.

3.3 The author claims that, in his personal circumstances, the risk of torture is more than real. He is wrongly accused of absconding from prison as he was temporary released by the penitentiary administration, and, due to objective reasons, he could not return to Kyrgyzstan. He notes that, during his stay in the places of deprivation of liberty in Kyrgyzstan, he has been subjected to discrimination as an ethnic Tajik.³ In Kyrgyzstan, he would be arrested immediately, which would aggravate the risk of him being tortured in order to force him to confess to the alleged abscondment, contrary to article 7 of the Covenant.

State party's observations on admissibility

4.1 In a note verbale dated 6 October 2014, the State party submitted its observations on admissibility. It recalls that the author, when in pre-removal detention, expressed the will to apply for asylum in the Russian Federation. In order to ensure his rights, officials of the Federal Migration Service visited him in detention, received his application, conducted an interview and filed an asylum form and questionnaire, as required under the 1993 Federal Act on Refugees.

4.2 The State party notes that the author is subject to an international search warrant at the request of the Kyrgyz authorities for having absconded from a place of deprivation of liberty while serving a sentence, and also in order to resume the execution of the sentence handed down by the Alay district court of the Osh region on 23 April 2004.

4.3 The State party recalls that, on 23 April 2004, the author was sentenced by the Alay district court of the Osh region to 14 years' imprisonment for having unlawfully acquired, imported and stored in Kyrgyzstan some 5 kg and 300 g of a narcotic substance, namely heroin, with the intention of selling it.

² Available at www.amnestyusa.org/reports/annual-report-kyrgyzstan-2013/.

³ No further details provided.

4.4 The author's asylum application was examined by the Moscow office of the Federal Migration Service in a comprehensive and objective manner within the required deadlines, taking into account the situation in Kyrgyzstan. On 4 March 2014, the Moscow office of the Federal Migration Service rejected the author's asylum application, as he did not constitute a refugee for the purposes of the 1993 Federal Act on Refugees. Under the Act, a refugee is a person who has grounded, reasonable fears that he or she will be persecuted based on race, religion, citizenship, nationality, membership in a particular social group, or political opinions, and who is outside of his or her country of origin and cannot benefit from the protection of that country or does not want to benefit from such protection in the light of those fears.

4.5 The Federal Migration Service concluded that the author risked no persecution in Kyrgyzstan on the basis of political opinions, race, religion, citizenship, nationality or membership in a particular social group. No humanitarian considerations prevented the author's removal or required his stay in the Russian Federation. The Federal Migration Service took its decision based on the analysis of the author's claim and the material provided by the Prosecutor General's Office of the Russian Federation regarding his extradition. The Federal Migration Service found no grounds for believing that, upon extradition, the author would be at risk of being subjected to torture.

4.6 The State party notes that the author did not apply for asylum when he arrived in the Russian Federation in January 2009. He did so only in February 2014, after having been detained in view of his extradition to Kyrgyzstan.

4.7 The author's fear regarding his criminal prosecution cannot serve as a ground for granting asylum. Under the criminal law of the Russian Federation, the acts of which the author is accused in Kyrgyzstan equally constitute a crime sanctioned by a deprivation of liberty.

4.8 According to the State party, the author's argumentation regarding not being guilty of the crime of which he is accused (abscondment from a place of deprivation of liberty) does not form part of the examination of an asylum claim.

4.9 The author adduced no evidence before the Federal Migration Service confirming the existence of substantive grounds for fearing cruel treatment by Kyrgyz officials. The Federal Migration Service has comprehensively examined all grounds for asylum in the author's case, which received the necessary assessment and qualification, and, as a result, a decision was issued in strict conformity with the law and the State party's international obligations.

4.10 The State party notes that the author's communication is unsubstantiated and not compliant with the admissibility criteria under article 5 of the Optional Protocol.

4.11 Under article 412.1 of the Code of Criminal Procedure, decisions having acquired res judicata force can be re-examined within one year after adoption under the supervisory review proceedings by the Presidium of the Supreme Court. Under article 412.1 (1) (3) of the Code of Criminal Procedure, the Presidium of the Supreme Court examines at first instance court decisions by the supreme courts of the republics, *kray* or regional courts, the courts of the cities of federal importance, and the courts of the autonomous regions or autonomous districts, which have acquired the force of res judicata, provided that they have been subjected to appeal examination by the Supreme Court of the Russian Federation.

4.12 In that regard, the State party notes that the author could have sought the supervisory review of the Moscow City Court decision of 9 April 2014 rejecting the appeal against the decision of the Prosecutor General's Office allowing his extradition, as well as of the ruling of the Supreme Court of 25 June 2014 confirming the Moscow City Court's decision. Thus, not all domestic remedies have been exhausted by the author.

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

5.1 In a letter dated 16 March 2015, the author's counsel provided comments on the State party's observations on admissibility. Counsel notes that the final decision in the author's case was rendered on appeal by the Supreme Court of the Russian Federation on 25 June 2014. The supervisory review proceedings before the Presidium of the Supreme Court constitute an extraordinary means of appeal. Introducing a protest motion to initiate a

supervisory review falls within the prerogatives of the judge examining the complaint, and thus there is no guarantee of an unconditional examination of the case.

5.2 Counsel notes in addition that, on 15 August 2014, the author was transferred from Moscow to the Federal Service of Execution of Penalties in the region of Omsk in view of his extradition. According to counsel, the author has in fact already been extradited.

5.3 Counsel recalls the author's claims that, contrary to article 7 of the Covenant, upon extradition he would be at risk of being subjected to torture and inhuman or cruel treatment as an ethnic Tajik.⁴

5.4 Counsel adds that, during his stay in the penitentiary colony in Jalal-Abad, the author was subjected to cruel treatment by penitentiary officials on the basis of his ethnicity.⁵

5.5 In support of the argumentation regarding the persecution of national minorities in Kyrgyzstan, counsel refers to the judgment of the European Court of Human Rights in *Ergashev v. the Russian Federation* (application No. 49747/11), in which the Court noted that, based on the numerous reports submitted by international organizations on the respect of human rights in Kyrgyzstan, it should be noted that, despite the improvement in the situation since the summer of 2010, torture, cruel treatment and extortion were still widely used by law enforcement officials against ethnic Uzbeks suspected of having committed crimes during the clashes of 2010. The Court thus found that there were grounds for believing that a risk of treatment contrary to article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) existed and that the applicant's extradition would constitute a violation of that Convention. Even though the author in the present case is an ethnic Tajik, not an Uzbek, according to counsel he nevertheless risks persecution based on his ethnicity.

5.6 Counsel believes that the risk of the author being subjected to torture is more than real, as he is accused of abscondment from a place of deprivation of liberty even though he was released by the penitentiary administration in order to attend his father's funeral, and due to objective circumstances he could not return on time.

5.7 Counsel claims that, upon return to Kyrgyzstan, the author would be immediately arrested, which would expose him to a risk of being tortured so as to force him to confess to the alleged abscondment.

State party's observations on the merits

6.1 In a note verbale dated 30 July 2015, the State party provided its observations on the merits. Firstly, it observes that counsel's argumentation regarding the author's criminal prosecution based on his ethnicity is groundless. The author's prosecution is general in nature and has nothing to do with Kyrgyz politics.

6.2 On 9 April 2014, when examining the author's claims against the decision of 24 January 2014 by the Prosecutor General's Office allowing his extradition, the Moscow City Court found that the author's allegations that he was unaware of having been prosecuted in Kyrgyzstan were refuted by the case file material. In court, the author did not refute having left the penitentiary institution prior to the completion of his prison term, nor did he refute having left Kyrgyzstan. He did not challenge the grounds of his prosecution relating to drug trafficking, which served as the basis for his sentence. The case file material shows that, during his imprisonment, the author signed an agreement that he would not attempt to escape.

6.3 Those facts, when read together, show that the author was aware of the need to serve his sentence, which has been reduced by virtue of various amnesty acts, as well as of the need not to attempt to avoid serving the sentence. No convincing or truthful information was presented to the court to show that the author had left the penitentiary colony and travelled abroad based on an agreement with the penitentiary administration. On the contrary, the

⁴ Counsel reiterates the reference to the reports of the Special Rapporteur on torture, the United States State Department and Amnesty International (see para. 2.3).

⁵ No further details provided.

material presented by the Prosecutor General's Office showed that no authorization to travel outside of the colony had ever been issued to the author.

6.4 The Kyrgyz authorities applied no prejudicial attitude against the author, as is shown by the application of three general amnesty acts in his case and the reduction of his sentence; by his transfer from a colony with a strict regime to a colony settlement benefiting from mobility without a convoy; but also by the absence of complaints about the use of physical force or about medical assistance.

6.5 When arrested in Moscow, the author was not registered as a migrant and had no work permit in the Russian Federation. No convincing or truthful information was presented in court that would constitute grounds for believing that, upon return, the author would be subjected to torture or unlawful treatment in the context of his criminal prosecution.

6.6 The State party adds that the court found no grounds for not believing the guarantees presented by the Kyrgyz Prosecutor General's Office in accordance with the provisions of the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases.

6.7 On the basis of the above, on 9 April 2014 the Moscow City Court confirmed as lawful and grounded the ruling of the Deputy Prosecutor General of the Russian Federation allowing the author's extradition.

6.8 On 25 July 2014, the Supreme Court of the Russian Federation, on appeal, confirmed the decision of the Moscow City Court of 9 April 2014, noting that, in accordance with the decision of the Moscow office of the Federal Migration Service of 4 March 2014, the author's asylum application had been rejected.

6.9 The State party observes that the materials that formed the basis for the decision allowing the extradition contain no information to show that the author faces a personal risk of torture or other cruel, inhuman or degrading treatment upon return. No such information was presented to the court of appeal either.

6.10 Following his extradition from the Russian Federation to Kyrgyzstan, according to information from the Kyrgyz Prosecutor General's Office, on 3 December 2014, the Osh City Court found the author guilty of abscondment from a place of deprivation of liberty under article 336 (1) of the Criminal Code, and, taking into account the remaining prison term to be served, sentenced him to 2 years and 7 months' imprisonment in a penitentiary colony with a strict regime. The court took into account the time the author had spent in pretrial detention, amounting to 1 year, 3 months and 8 days. The judgment of 3 December 2014 was not appealed and entered into force. During the investigation and the trial, the author was represented by a lawyer, Ms. D. Neither the author nor his legal counsel filed any complaints whatsoever to the administration of the pretrial detention centre regarding cruel treatment.

6.11 After the completion of his prison term, on 5 January 2015, the author was released, and he left for Tajikistan.

6.12 The State party concludes by noting that there are no grounds for believing that, upon return to Kyrgyzstan, the author was subjected to torture or other cruel, inhuman or degrading treatment or punishment.

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 97 of its rules of procedure, whether it is admissible under the Optional Protocol to the Covenant.

7.2 In accordance with article 5 (2) (a) of the Optional Protocol, the Committee shall not consider any communication from an individual unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee has ascertained that an application on the author's behalf, including a request for interim measures of protection to stop his extradition from the Russian Federation to Kyrgyzstan, was submitted to the European Court of Human Rights on 25 June 2014. The

Committee notes that, on 26 June 2014, the European Court of Human Rights rejected the request for interim measures and informed the applicant that, in these circumstances, the case file would be destroyed in due course without further consideration.⁶ In these circumstances, the Committee considers that it is not precluded by virtue of article 5 (2) (a) of the Optional Protocol from considering the present communication.

7.4 The Committee notes that the State party challenges the admissibility of the communication due to non-exhaustion of the available domestic remedies. The State party has observed in this regard that the author has failed to complain to the Presidium of the Supreme Court under the supervisory review proceedings as set out under article 412 (1) of the Code of Criminal Procedure. In this connection, the Committee recalls its jurisprudence according to which filing requests for supervisory review with the president of a court with respect 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.⁷ The Committee notes that, in the present case, the State party has not shown whether or in how many cases petitions to the Supreme Court for supervisory review procedures were successful in cases of allegations of torture and ill-treatment. Accordingly, the Committee concludes that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the present communication.

7.5 The Committee notes the author's claims under article 7 of the Covenant to the effect that, in the event of extradition, as a member of an ethnic minority as a Tajik in Kyrgyzstan, he would be at risk of persecution and inhuman, degrading and cruel treatment, including torture.

7.6 The Committee notes the author's submission in support of his claims regarding the occurrence of torture in Kyrgyzstan, including against members of the Uzbek minority and in particular in the south of Kyrgyzstan. It further notes that the author has also claimed, without, however, providing any further substantiation or explanation, that he was persecuted on the basis of his ethnicity while in detention in Kyrgyzstan.

7.7 On the basis of the material on file, however, the Committee considers that the author has failed to sufficiently substantiate his claims. It considers in particular that the author has failed to link the human rights situation in Kyrgyzstan to his personal context. In the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate his allegations for the purposes of admissibility. Accordingly, it declares the author's claims under article 7 inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and to the author.

⁶ Application No. 46381/14. A copy of the letter from the European Court of Human Rights, dated 26 June 2014, is on file.

⁷ *Gelazauskas v. Lithuania* (CCPR/C/77/D/836/1998), para. 7.4; *Sekerko v. Belarus* (CCPR/C/109/D/1851/2008), para. 8.3; *Protsko and Tolchin v. Belarus* (CCPR/C/109/D/1919-1920/2009), para. 6.5; *Schumilin v. Belarus* (CCPR/C/105/D/1784/2008), para. 8.3; *P.L. v. Belarus* (CCPR/C/102/D/1814/2008), para. 6.2; and *Taysumov et al. v. Russian Federation* (CCPR/C/128/DR/2339/2014), para. 8.5.