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Human Rights Committee

Communication No. 2043/2011

Views adopted by the Committee at its 114th session (29 June-24 July 2015)

Submitted by:	V. M. (not represented by counsel)
Alleged victim:	The author
State party:	The Russian Federation
Date of communication:	9 November 2010 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 April 2011 (not issued in document form)
Date of adoption of Views:	15 July 2015
Subject matter:	Error in calculation of sentence under new legislation
Procedural issues:	Substantiation of claims
Substantive issues:	Retroactive application of criminal law
Articles of the Covenant:	Articles 2 (2) and (3) (a), 9 (5), 14 (1) and (5), 15 (1) and 26
Article of the Optional Protocol:	Article 2

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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 (114th session)

concerning

Communication No. 2043/2011*

Submitted by:	V. M. (not represented by counsel)
Alleged victim:	The author
State party:	The Russian Federation
Date of communication:	9 November 2010 (initial submission)

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

Meeting on 15 July 2015,

Having concluded its consideration of communication No. 2043/2011, submitted to the Human Rights Committee by V. M. 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 V. M., a national of the Russian Federation born in 1966. The author claims to be a victim of a violation by the Russian Federation of his rights under articles 2 (2) and (3) (a), 9 (5), 14 (1) and (5), 15 (1) and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is not represented by counsel.

The facts as submitted by the author

2.1 The author submits that on 10 June 1999, he was found guilty by the Court of the Nerchinsky District of the Chita region under several articles of the Criminal Code of the Russian Federation, such as article 116 (battery); article 119 (threat of murder or great bodily injury); article 131, paragraph 2 (a) (d) (rape of a juvenile by a previously/repeatedly

* The following members of the Committee participated in the consideration of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

convicted person); and article 132, paragraph 2 (a) (d) (sexual violence committed against a juvenile by a previously/repeatedly convicted person). The author was sentenced to seven years' imprisonment under article 131; another seven under article 132; 2 years under article 119; and six months of correctional labour. Adding together all the sentences under the "partial addition" rule, the court sentenced the author to 15 years' imprisonment, to be served in a correctional colony under a special regime.

2.2 The author submits that on 17 June 1999, he filed a cassation appeal to Chita Regional Court, challenging his conviction. On 23 August 1999, Chita Regional Court upheld the decision of the first instance court. On 12 April 2001, Chita Regional Court, following the complaint filed by the Chairman of Chita Regional Court under the supervisory review procedure, changed the author's correctional regime from a general[1] to a strict regime. In addition, the author's acts were qualified as "dangerous recidivism" (article 18, paragraph 2, of the Criminal Code).

2.3 On 8 December 2003, the State Duma (the lower house of the Federal Assembly) of the Russian Federation adopted Federal Law No. 162 on amendments and additions to the Criminal Code of the Russian Federation. The law excluded from all the articles of the Criminal Code the element of crimes committed by previously/repeatedly convicted persons. The author claims that article 69 of the Criminal Code was also amended, and the maximum term of imprisonment under article 69, paragraph 3, was lowered from 25 to 15 years.

2.4 In March 2004, the author filed a complaint with the Court of the Nerchinsky District of the Chita region, requesting the review of his sentence in the light of the new criminal law provisions introduced under Federal Law No. 162. He asked for the following changes to be introduced to his sentence: (a) the exclusion from the acts qualified under article 131, paragraph 2 (a) and (d), and under article 132, paragraph 2 (a) and (d), of the word "repeatedly"; (b) the reclassification of his acts as falling under articles 131, paragraph 1, and 132, paragraph 1, of the Criminal Code; (c) on the basis of article 10 of the Criminal Code[2] and the provision of article 69, paragraph 3 (as amended by Federal Law No. 162), the proportional lowering of his penalty from 15 to 9 years' imprisonment,[3] as provided for by the new criminal law.[4]

2.5 By decision of 26 May 2004, the Court of the Nerchinsky District partially agreed with the author, in line with Federal Law No. 162, and considered the author convicted

[1] The author also refers to this as a "special regime".

[2] Article 10 of the Criminal Code is worded in similar terms as article 15 (1) of the Covenant.

[3] The author argues that his penalty should have been reduced to 9 years' imprisonment after the adoption of Federal Law No. 162. It seems that he means the following: on 10 June 1999, he was convicted for battery, threat of murder, rape of a juvenile and violent sexual acts committed against a juvenile. Under article 69, paragraph 3, of the Criminal Code, the final penalty imposed was 15 years' imprisonment. The upper limit of the penalty for the most severe crime committed by the author was 25 years' imprisonment. As he was sentenced to 15 years' imprisonment (15 is three fifths of 25), when the court brought the judgement of 10 June 1999 into line with Federal Law No. 162 and deleted the reference to articles 131(2) (a) and 132 (2) (a), part of these articles became void: subparagraph (a) referred to acts committed by a repeatedly/previously convicted person. As the indication "repeatedly/previously" was removed from the Criminal Code under Federal Law No. 162, and the upper limit for the most serious crime therefore became 15 years, the author claims that the court should also have proportionally reduced his penalty. Under the previous law, three fifths of 25 resulted in 15 years' imprisonment, so under the current law, the author claims, three fifths of 15 is equal to 9 years' imprisonment.

[4] The author perceives Federal Law No. 162 as a new criminal law and uses this wording in his communication.

under articles 116 (battery); 119 (threat of a murder or a great bodily injury); 131, paragraph 2 (d) (rape of a juvenile); and 132, paragraph 2 (d) (sexual violence committed against a juvenile). The court, however, refused to change the author's overall sentence, which remained 15 years' imprisonment.

2.6 On 7 July 2004, the author lodged a cassation appeal before Chita Regional Court against the decision of 26 May 2004 of the Court of the Nerchinsky District. On 19 July 2004, Chita Regional Court upheld the previous decision, ruling that on the basis of article 69 of the Criminal Code, the author was sentenced to 15 years' imprisonment and his penalty was not heavier than the upper limit of sanctions established for the crimes committed.[5] Chita Regional Court reasoned that the author's sentence was within the range of sentences that could have been imposed for committing the crimes of which the author was found guilty, and therefore his penalty was not subject to review.

2.7 The author attempted to bring appeals through the supervisory review procedure. His appeals were dismissed by Chita Regional Court on 24 February 2005, by the Chairperson of Chita Regional Court 20 May 2005, by the Supreme Court on 25 April 2006 and by the Deputy Chairman of the Supreme Court on 23 January 2007.

2.8 On 20 April 2006, the Constitutional Court of the Russian Federation confirmed the constitutionality of the provision in article 10 (2) of the Criminal Code,[6] and of certain provisions of the Criminal Procedure Code concerning the procedure for bringing judicial decisions into conformity with the new criminal law which eliminates or mitigates the responsibility for a committed crime. After that Constitutional Court ruling, the author attempted again to appeal against the decision of 26 May 2004 of the Court of the Nerchinsky District and the cassation decision of 19 July 2004 of Chita Regional Court through the supervisory review procedure. However, his appeals were rejected on the basis of article 412, paragraph 1, of the Criminal Procedure Code.[7]

2.9 In November 2008, the author lodged an application with the Constitutional Court with a request to consider the constitutionality of article 412, paragraph 1, of the Criminal Procedure Code, and claimed that it violated his right to judicial protection. On 29 January 2009, the Constitutional Court confirmed the constitutionality of that provision. On 1 April 2009, the author again appealed through the supervisory review procedure to the Chairperson of the Supreme Court. His appeal was dismissed on 24 April 2009 for the same reason, spelled out in article 412, paragraph 1, of the Criminal Procedure Code. The author therefore claims to have exhausted all available and effective domestic remedies.

The complaint

3.1 The author claims that the refusal of the courts to review his sentence after the adoption of Federal Law No. 162 amounts to a violation of article 15 (1) of the Covenant.

3.2 The author submits that the courts failed to address all his allegations and to provide a legal basis for their conclusions. Moreover, his numerous appeals were dismissed, which amounts to a violation of article 14 (1) of the Covenant.

3.3 The author claims that his requests for his sentence to be reviewed were dismissed by the courts in violation of article 14 (5) of the Covenant. The rejection of all his appeals

[5] It appears that the upper limit was 25 years' imprisonment.

[6] Article 10, on retroactivity of a criminal law, provides in paragraph 2 that if a new criminal law mitigates the punishment for a crime, the penalty served by a person who committed that crime shall be subject to a reduction within the limits provided for by the new criminal law.

[7] Article 412, paragraph 1, provides that submitting complaints or applications to the supervisory review courts that have dismissed them previously is inadmissible.

from 2006 to 2009 under the supervisory review procedure also amounts to a violation of article 14 (5) of the Covenant.

3.4 The author alleges that his penalty should have been reduced from 15 years' imprisonment to 9 years after the adoption of Federal Law No. 162. He claims that his prison term should have ended on 7 December 2007,[8] and thus that he has been a victim of unlawful detention since then. Accordingly, the author contends, his rights under article 9 (5) of the Covenant have also been violated.

3.5 The author claims a violation of article 26 of the Covenant, pointing to what he calls the "unjustified differentiation" employed by the national courts by refusing to review his penalty under the new criminal law, as opposed to other cases in which offenders have had their penalties reviewed and reduced accordingly.

3.6 Lastly, the author alleges that the State party has also violated articles 2 (1) and (3) (a) of the Covenant.

State party's observations on admissibility and the merits

4.1 By note verbale of 12 July 2011, the State party submits that the author was indeed sentenced to 15 years' imprisonment for the crimes he committed. Furthermore, in accordance with Federal Law No. 162, the author's sentence was amended in that it no longer included references to the repeated nature of the author's previous offences.

4.2 The author requested that his sentence be reduced from 15 to 9 years' imprisonment since, according to his calculations based on his understanding of article 69, paragraph 3, of the Criminal Code, the upper limit of the sentences for the crimes of which he was convicted was 15 years. Accordingly, the author argues, his sentence should be reduced proportionally.

4.3 The State party submits that the author's calculations are incorrect. Russian law does not mandate the proportional reduction of sentences, nor is this supported by article 15 (1) of the Covenant. The courts refused to amend the author's sentence, since it was within the limits set under the new article 69, paragraph 3, of the Criminal Code; the 15-year sentence fell within the upper limit imposable under that provision.

4.4 The author's allegations regarding the violations of article 14 (5) of the Covenant are also without merit. The courts considered the author's appeals both in cassation and supervisory review procedures.

4.5 Regarding the author's claims relating to articles 2 and 26 of the Covenant, the State party considers them to be unsubstantiated. The author has not presented any information regarding the alleged discrimination. The same is true for the author's contentions regarding the alleged violations of article 9 of the Covenant. The author is serving a sentence pursuant to an order of a court, and thus, his imprisonment cannot be considered to be arbitrary.

Author's comments on the State party's observations

5.1 On 6 September 2011, the author submitted that under the amendment to the Criminal Code, the courts had worsened his position compared to his initial sentence, thus violating the provisions of article 15 (1) of the Covenant. While during his initial

[8] According to the judgement of the first instance court, the author's prison term started on 7 December 1998.

sentencing, the court used the "partial addition" rules to calculate his sentence, the new ruling dated 26 May 2004 used the full addition rules.

5.2 The author claims that, in accordance with article 9 (5) of the Covenant and the provisions of Federal Law No. 68 dated 30 April 2010, he has an enforceable right to compensation as a victim of arbitrary detention by the State party.

5.3 The author submits that his rights to appeal against court decisions were also violated. He argues that instead of rejecting his supervisory review requests, the Supreme Court should have considered them on the merits.

5.4 In an additional submission dated 15 January 2013, the author indicated that on 29 November 2012, Zabaikalsk Regional Court, acting upon a request by the prosecutor's office, reduced the author's sentence to 14 years and 10 months' imprisonment. Zabaikalsk Regional Court based its decision on the order of 20 April 2006 of the Constitutional Court of the Russian Federation. That order establishes that a law that improves a convicted person's status should be applied in every case. In applying that rule, the court can lower the lowest or highest possible sentence, or annul certain aggravating circumstances that would affect the sentence.

5.5 Zabaikalsk Regional Court decided to lower the initial sentence imposed on the author relating to charges under articles 131 and 132 of the Criminal Code. His sentences in that regard were reduced to 6 years and 11 months each. By adding those two reduced sentences, the court amended the author's sentence to a total of 14 years and 10 months of imprisonment.

5.6 The author submits that he disagrees with that decision, and that based on his previous reasoning, his overall sentence should have been reduced to 9 years' imprisonment. He argues that the State party's authorities refuse to modify his sentence to 9 years because if they do so, they will have to pay him compensation for damages.

5.7 The author subsequently tried to appeal that latest court decision before the prosecutor's office of the Zabaikalsk region, the Court of the Chernishevsky District, the Supreme Court and the Constitutional Court of the Russian Federation. All his appeals were rejected.

5.8 The author submits that on 5 July 2013, he was released from prison. On 26 June 2013, by the decision of the Court of the Nerchinsky District, he was placed on administrative supervision for the period of 6 years. According to that court decision, the author has to report to the local police station in the place of his residence twice a month, and he is not allowed to leave the city limits of the city of Kansk in the Krasnoyarsk region.

State party's additional submissions

6.1 By note verbale of 23 May 2013, the State party reiterated that the author's claims are without merit, and that the State party's authorities did not violate any domestic law or its international obligations. The final sentence of 14 years and 10 months, as set by Zabaikalsk Regional Court, reflects the requirements of all the changes that were introduced under Federal Law No. 162. The court decision was based on the order of 20 April 2006 of the Constitutional Court of the Russian Federation.

6.2 The Supreme Court of the Russian Federation, by rejecting the author's supervisory review request on 13 February 2013, acted within its authority and in accordance with the legislation.[9]

Issues and proceedings before the Committee

Consideration of admissibility

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

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

7.3 The Committee takes note of the author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in this connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

7.4 The Committee has noted the author's claims under articles 2 (1) and (3) (a), 9 (5), 14 (1) and (5) and 26 of the Covenant. In the absence of any further pertinent information on file, the Committee considers that the author has failed to substantiate, for purposes of admissibility, these allegations. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that the author's remaining claims raising issues under article 15 (1) of the Covenant have been sufficiently substantiated, for purposes of admissibility. It therefore declares this part of the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, in accordance with article 5 (1) of the Optional Protocol.

8.2 With regard to the claim made under article 15 (1) of the Covenant, the Committee takes note of the author's argument that his sentence should have been reduced proportionally, based on the amendments to the Criminal Code introduced by Federal Law No. 162 dated 8 December 2003. These amendments introduced a new upper limit on the sentences that can be handed down as a result of a criminal conviction, using the full or partial addition of sentences. According to this formula, the courts calculated the maximum sentence for the author to be 15 years, but the author argues that the upper limit should have been reduced to 9 years. The author argues that the State party's courts should have observed the proportionality rule and should have reduced the upper limit of his sentence, which under the old law used to be 25 years. Indeed, the calculations show that if the State party's courts used the principle of proportionality, the upper limit would have been reduced to 15 years under the new law, resulting in 9 years' imprisonment for the author.

8.3 The Committee also notes the State party's argument that nothing in the new Federal Law No. 162 calls the courts to apply any proportionality rule. The author's maximum

[9] In its submission dated 25 October 2013, the State party reiterated its position regarding the author's claims.

sentence was established at 15 years, and the author's original sentence dated 10 June 1999 was within this range of sentences. The Committee also notes the State party's reasoning that on 29 November 2012, Zabaikalsk Regional Court did indeed lower the author's sentence from 15 years to 14 years and 10 months. The Committee notes that, even assuming for the purposes of argument that article 15 (1) of the Covenant applies to the period after the final conviction, the author has not shown that the sentence that was handed down under the previous version of the law does not fall within the sentencing margins of the new law. In this regard, the Committee refers to its previous jurisprudence in *Gavrilin v. Belarus*[10] and *Filipovich v. Lithuania*,[11] in which it concluded that there was no violation of article 15 (1) of the Covenant because the author's conviction was well within the margins of the new sentencing scheme, and notes that the author's initial sentence was within the margins provided both by the old law and the new version of the law, as amended by Federal Law No. 162 of 8 December 2003. The Committee also notes that in determining the sentence, the domestic courts reviewed and took into account the specific circumstances of the case, and that upon order of the Constitutional Court of the Russian Federation, Zabaikalsk Regional Court reduced the author's sentence to 14 years and 10 months. In the circumstances of the present case the Committee cannot, based on the material before it, conclude that the author's sentence was incompatible with article 15 (1) of the Covenant.

9. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[10] See communication No. 1342/2005, *Gavrilin v. Belarus*, Views adopted on 28 March 2007, para. 8.3.

[11] See communication No. 875/1999, *Filipovich v. Lithuania*, Views adopted on 4 August 2003, para. 7.2.