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HUMAN RIGHTS COMMITTEE
Seventy-eighth session
14 July-8 August 2003

VIEWS

Communication No. 814 /1998*

Submitted by:	Mr. Mikhail Ivanovich Pastukhov
Alleged victim:	The author
State party:	Belarus
Date of communication:	11 February 1992
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 13 May 1998 (not issued in document form)
Date of adoption of Views:	5 August 2003

On 5 August 2003, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 814/1998. The text of the Views is appended to the present document.

[Annex]

* Made public by decision of the Human Rights Committee.

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

Seventy-eighth session

concerning

Communication No. 814/1998[**]

Submitted by: Mr. Mikhail Ivanovich Pastukhov

Alleged victim: The author

State party: Belarus

Date of communication: 11 February 1998 (initial communication)

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

Meeting on: 5 August 2003,

Having concluded its consideration of communication No. 814/1998, submitted to the Human Rights Committee by Mr. Mikhail Ivanovich Pastukhov 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:

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed by Committee members Mrs. Ruth Wedgwood and Mr. Franco DePasquale is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author is Mr. Mikhail Ivanovich Pastukhov, a Belarusian citizen resident in Minsk (Belarus). He claims to be a victim of a violation by Belarus of article 2 of the International Covenant on Civil and Political Rights. The communication also appears to raise issues relating to article 14, paragraph 1, and article 25 (c) of the Covenant. The author is not represented by counsel.

1.2 The Covenant and the Optional Protocol thereto entered into force for Belarus on 23 March 1976 and 30 December 1992 respectively.

The facts as submitted by the author

2.1 On 28 April 1994, the Supreme Council (Parliament), acting according to the relevant legal procedure and, in particular, the Constitution of 15 March 1994, elected the author a judge of the Constitutional Court for a period of 11 years.

2.2 By a presidential decree of 24 January 1997, the author lost his post on the ground that his term of office had expired following the entry into force of the new Constitution of 25 November 1996[1].

2.3 On 11 February 1997, the author applied to a district court for reinstatement. On 21 February 1997, the court refused to admit the application.

2.4 On 31 March 1997, the author appealed that decision to the Minsk Municipal Court, which rejected his appeal on 10 April 1997 on the ground that the courts were not competent to consider disputes over the reinstatement of persons, such as Constitutional Court judges, who had been appointed by the Supreme Council of the Republic of Belarus.

2.5 On 2 June 1997, the author applied for judicial review to the Supreme Court. On 13 June 1997, the Supreme Court dismissed the application on the above ground.

The complaint

3.1 The author contends that the presidential decree of 24 January 1997 is unlawful.

3.2 He explains that the decree refers to article 146 of the Constitution of 25 November 1996, which provides that the President of the Republic, the Parliament and the Government shall, within two months of the entry into force of the Constitution, appoint and set up the organs within their jurisdiction. He argues that the Constitution cannot, any more than any other law, retroactively affect a citizen's legal standing, and contends with respect to his own situation that judges can only be replaced when their posts fall vacant and that it was therefore manifestly arbitrary to abridge his term of office.

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[1] "Presidential decree N°106 of 24 January 1997 dismissing Mr. Mikhail Pastukhov from his duties as judge of the Constitutional Court: In conformity with article 146 of the Belarus Constitution, Mr. Pastukhov is dismissed from his duties as judge of the Constitutional Court upon expiry of his term of office."

3.3 He further explains that the activities of the Constitutional Court are governed by a special law, the Constitutional Court of the Republic of Belarus Act. Article 18 of the Act contains an exhaustive list of the circumstances in which judges' terms of office may be curtailed. The ground cited in the decree of 24 January 1997 is not among them and the decree must therefore be considered unlawful. In addition, the decree is in violation of article 25 of the Act, which guarantees the independence of the judiciary through means including a procedure for judges' suspension and removal from office.

3.4 The author maintains that, in breach of article 2 of the Covenant, the courts wrongly denied him the protection of the law in his dispute with the Head of State.

3.5 The author states that all internal remedies have been exhausted and that the matter has not been submitted to any other procedure of international investigation or settlement.

The State party's observations concerning admissibility and the merits of the communication

4.1 In its observations of 14 July 1998, the State party disputes the admissibility of the communication.

4.2 It maintains that the judicial decisions concerning the author's applications were consistent with article 224 of the Labour Code. This article provides that any dispute concerning the ending of the employment of persons appointed by the President of the Republic, elected, appointed or confirmed by the Parliament or elected by local councils of deputies must be examined as prescribed by law, and the State party therefore argues that the Labour Code provides for persons in the same category as the author, namely persons elected by the Parliament, a dispute settlement procedure differing from the usual one. The State party concludes that the author did not follow the procedure provided for by law and that his complaint that he was unable to enforce his rights is therefore baseless.

4.3 In its observations of 24 January 2001, the State party repeats that the author's service as a judge was terminated by presidential decree on the ground of expiry of the term of office of Constitutional Court judges. It again stresses that, by virtue of article 224 of the Labour Code, the author's dispute was not a matter for the courts.

4.4 The State party further maintains that the Labour Code of 1 January 2000 superseded the previous Labour Code (and, therefore, article 224) and gave full effect not only to the provisions of article 60 of the Constitution of 25 November 1996 guaranteeing the protection of personal rights and freedoms by a competent, independent and impartial court within the time-limits set by law, but also to the provisions of article 2 of the International Covenant on Civil and Political Rights concerning judicial remedies.

4.5 The State party declares that henceforth, pursuant to article 242 of the Labour Code, everyone has the right to apply to a court within one month for reinstatement in their post.

4.6 The State party therefore asserts that the new Labour Code has removed all restrictions on judicial recourse and that the author could have appealed to the courts within the specified time limits. It says that it has no information concerning the author's situation in that respect.

The author's comments

5.1 In his comments of 20 March 2002, the author first reiterates the reasons why he considers the presidential decree of 24 January 1997 unlawful. He states that application of the decree cannot be justified as having been "in connection with the expiry of the judicial term of office" since the latter phrase does not appear in current Belarusian law. Consequently, the action by the President of the Republic constituted interference in the activities of the Constitutional Court and an infringement of his, the author's, civil and labour rights.

5.2 Next, the author contends that the State party's reasoning concerning the courts' competence to deal with the matter at issue is neither convincing nor based on the law in force at the time.

5.3 The author explains that article 61 of the Constitution of 15 March 1994 guaranteed the protection of personal rights and freedoms by a competent, independent and impartial court, a principle that was directly applicable in the absence of any law restricting it to particular categories of citizens. In the author's opinion, the principle was therefore applicable to judges of the higher courts, including the Constitutional Court, with respect to alleged breaches of their labour rights.

5.4 The author further asserts that article 4 of the Code of Civil Procedure made it obligatory for the courts to admit any complaint from a citizen for examination.

5.5 The author asserts that, in refusing to examine his application, the district court, the Minsk Municipal Court and the Supreme Court were in breach of the above-mentioned legislation. He alleges that the courts acted as they did because the dispute in question involved the Head of State, who could have dismissed the judges concerned. The author emphasizes that Belarusian courts are not independent from the executive, in particular the President of the Republic.

5.6 The author adds that article 224 of the Labour Code would only have been applicable if his application had been rejected by the courts following a trial. Since the courts had refused even to examine his application, the State party's invocation of that article was misplaced.

5.7 Third, the author refutes the State party's argument that the new Labour Code allowed him to file an appeal with the courts within the specified time limits. He points out in this regard that he was removed from the bench more than four years before the Labour Code came into force.

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with the rules 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 With regard to the question of exhaustion of domestic remedies, the Committee took note of the State party's arguments to the effect, firstly, that the author's complaint was not within the competence of the courts and, second, that under the new Labour Code of 1 January 2000 an appeal could be made to the courts. The Committee also took into consideration the author's arguments that, pursuant to the Constitution, the Code of Civil Procedure and the Labour Code in force at the time, the courts were obliged to consider his complaint and that the State party's invocation of the new Labour Code was irrelevant inasmuch as the time limit for appeal set in that law could not be applied retroactively to a dispute that had arisen in 1997.

6.4 The Committee recalls that it is implicit in rule 91 of its rules of procedure and article 4, paragraph 2, of the Optional Protocol that a State party to the Covenant should make available to the Committee all the information at its disposal, including, at the stage of determination of the admissibility of the communication, detailed information about remedies available to the victims of the alleged violation in the circumstances of their cases. The Committee considers that in the first instance the State party gave no information on effective, available remedies. The Committee considers that in the second instance the State party referred to a remedy before the courts under the new Labour Code that, according to the information at the Committee's disposal, cannot be linked to the specific circumstances of the author's case since it would not have been available with respect to a loss of employment that occurred three years before it was instituted. The Committee is therefore satisfied that the author met the conditions of article 5, paragraph 2 (b), of the Optional Protocol.

6.5 In the light of the above findings, the Committee declares the author's communication admissible, raising issues under articles 14 and 25 of the Covenant, in conjunction with article 2. Accordingly, the Committee proceeds to the examination of the merits of the communication, pursuant to article 5, paragraph ~~2~~ **1**, of the Optional Protocol.

Consideration on the merits

7.1 Pursuant to article 5, paragraph 1, of the Optional Protocol, the Human Rights Committee has examined the communication in the light of all written information made available to it by the parties.

7.2 In reaching its Views, the Committee has taken into account, first, the fact that the State party did not provide it with sufficiently well supported arguments concerning the effective remedies available in the present case and, second, that it did not respond to the author's allegations concerning either the termination of his service on the bench or the independence of the courts in that regard. The Committee draws attention to the fact that article 4, paragraph 2, of the Optional Protocol requires States parties to submit to it written explanations or statements clarifying the matter and the remedies, if any, that they may have taken. That being so, the allegations in question must be recognized as carrying full weight, since they were adequately supported.

7.3 The Committee takes note of the author's claim that he could not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of office of 11 years. The Committee also notes that presidential decree of 24 January 1997 N°106 was not based on the replacement of the Constitutional Court with a new court but that the decree referred to the author in person and the sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information at its disposal reveals a violation by the State party of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary and the provisions of article 2.

9. By virtue of article 2, paragraph 3, of the Covenant, the author has a right to an effective remedy including compensation. It is incumbent on the State party to ensure that there is no recurrence of such violations.

10. The Committee points out that, by acceding to the Optional Protocol, Belarus recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established. Accordingly, the Committee wishes to receive from the State party, within 90 days of the transmission of the present Views, information about the measures taken to give them effect. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual Opinion of Committee Members Mrs. Ruth Wedgwood
and Mr. Walter Kaelin
(concurring)

The dismissal of Judge Mikhail Ivanovich Pastukhov from his position as a judge of the Belarus Constitutional Court was part of an attempt to diminish the independence of the judiciary. While the organization of a national court system may be changed by legitimate democratic means, the change here was part of an attempt to consolidate power in a single branch of government through the pretense of a constitutional referendum. It has interrupted the state party's fledgling progress towards an independent judiciary. As such, the presidential decree dismissing Judge Pastukhov from his office as judge of the Constitutional Court violated the rights guaranteed to him and to the people of Belarus under Articles 14 and 25 of the Covenant.

(Signed): Ruth Wedgwood
(Signed): Walter Kaelin

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]