

**International Covenant on
Civil and Political Rights**

Advance unedited version

Distr.: General
5 April 2017

Original: English

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol,
concerning communication No. 2842/2016*.**

<i>Communication submitted by:</i>	S.Sh. (not represented by counsel)
<i>Alleged victim:</i>	I.Sh., S.Sh., E.Sh.
<i>State party:</i>	Kazakhstan
<i>Dates of communication:</i>	23 June 2016 (initial submission)
<i>Date of adoption of decision:</i>	28 March 2017
<i>Subject matter:</i>	Fair trial, torture, unlawful detention, discrimination, privacy, voting and election.
<i>Procedural issues:</i>	Exhaustion of domestic remedies, substantiation of claims, admissibility <i>ratione temporis</i> .
<i>Substantive issues:</i>	Fair trial, torture, unlawful detention.
<i>Articles of the Covenant:</i>	2 (1); 2 (3) (a, b, c); 7; 8 (3) (a); 9 (1-5); 10 (1), (2) (a), (3); 14 (1-3 (a-g), (5), (6); 15 (1-2); 17 (1-2); 25 (b) and 26
<i>Articles of the Optional Protocol:</i>	2; 5 (2) (b)

* Adopted by the Committee at its 119th session (6-29 March 2017).

** The following members of the Committee participated in the examination of the present communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V. J. Kran, Duncan Mahumuza Laki, Photini Pazartzis, Mauro Politi, Jose Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany, and Margo Waterval.

1.1 The author of the communication is S.Sh., a Kazakhstan citizen. He submits the communication on his behalf and on behalf of his sons I. and E. He claims that Kazakhstan violated the rights of I. under articles 2 (1); 2 (3) (a, b, c); 7; 8 (3) (a); 9 (1-5); 10 (1), (2) (a) and (3); 14 (1-3 (a-g), (5) and (6); 15 (1) and (2); 17 (1) and (2), 25 (b) and 26 of the Covenant. He also claims a violation of his own rights and the rights of E. under articles 2 (1), (3) (a, b, c); 7; 9 (1), (2), (4), (5); 10 (1); 14 (1) and (5); 15 (2); 17 (1) and (2); and 26 of the Covenant. The Optional Protocol entered into force for Kazakhstan on 30 September 2009.

1.2 On 5 September 2016, the Committee acting through its Special Rapporteur on new communications and interim measures, decided not to grant the author's request for measures of protection for him and I.

Factual background

2.1 On 12 February 2009, I. was detained by the police as a car theft suspect. He was kept at the Almalinsk district department of internal affairs in Almaty for two days, and claims to have been tortured there. After being threatened with the potential arrest of his brother, I. gave a confession, allegedly in the absence of a lawyer. The author was held in pre-trial detention on the basis of court decisions of 15 February, 10 April and 15 May 2009. On 5 October 2009, the Almaty City Court sentenced I. under article 178 (3) of the Criminal Code (robbery in a large amount committed by an organized group) to 8 years in prison. The author appealed as a legal representative of his son to the Supreme Court on 26 October 2009. On 21 April 2010, the Supreme Court reduced the sentence to 6 a years' prison term on the basis of new legislation. The author's appeal under the supervisory review proceedings to the Chairman of the Supreme Court, dated 13 June 2011, was rejected by the court on 1 August 2011. The author claims that the investigation was carried out with procedural violations, that his son's interrogation video recording was falsified by the prosecutors to remove the episodes where he might have been subjected to pressure and that the principal witness testimonies were not taken into account, among others. He claims that the ex officio lawyer who represented him at this stage signed the transcript of his questioning as a suspect and his confession, without being present during the questioning. The author was not informed about his right to hire a lawyer of his choice. He also claims that the trial was unfair, in particular because he and his son did not receive the closing indictment and did not have time to familiarize themselves with the case file. The court took into account all the unlawful evidence and based the verdict solely on I.'s confession given under duress. I. was not present at the appeal hearing.

2.2 I. served his sentence in correction colony LA/155-13 and was released on 11 February 2015. The author claims that his son was held in inhuman conditions in the colony, mainly due to the lack of necessary medical assistance for his numerous diseases, including tuberculosis. The author claims that, after his release from prison, the State should have provided I. with housing and a means of existence and claims that currently his son is suffering from several diseases contracted in prison and sustained after being tortured by the police. He submits as well that without a registration at a particular address his son could not vote in the elections. On 3 April 2012, I. requested anticipated release, which was refused by a court on 10 April 2012. On 3 September 2013, he requested his sentence to be reduced from 6 to 5 years. His request was rejected by a court on 10 October 2013.

2.3 On 13 February 2009, police searched the author's apartment in connection with the suspicion of I. The author claims that the police had a wrong search warrant, that they hit him and caused his son E. to have a heart attack. He also submits that, after the search, E. was taken for questioning to the police detention facility, where his brother I. was held, and was kept there until 7:30 p.m.

2.4 On 10 February 2016, I. was detained by police for 1.5 hour in connection to a theft allegedly committed by his acquaintances. He was ill-treated in detention facility. On 11 February 2016, I. submitted a complaint to the prosecutor's office in Almaty in this regard.

The complaint

3.1 The author claims that the rights of I. under articles 2 (1) and (3) (a, b, c); 7; 8 (3) (a); 9 (1-5); 10 (1), (2) (a) and (3); 14 (1-3 (a-g), (5) and (6); 15 (1) and (2); 17 (1) and (2), 25 (b) and 26 of the Covenant were violated in particular due to torture by the police, lack of effective investigations thereof, irregularities in pre-trial investigation, unlawful detention and lack of a fair trial.

3.2 He also claims a violation of his own rights and the rights of his son E. under articles 2 (1), (3) (a, b, c); 7; 9 (1), (2), (4), (5); 10 (1); 14 (1) and (5); 15 (2); 17 (1) and (2); and 26 of the Covenant among others, due to the unlawful police search, the lack of effective investigation into the author's respective complaints, and the unlawful keeping of E. in the police detention facility.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

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

4.3 The Committee notes that the majority of the events in the author's case happened before 30 September 2009, thereby taking place before the entry into force of the Optional Protocol for the State party. The Committee observes that it is precluded *ratione temporis* from examining alleged violations of the Covenant which occurred before the Optional Protocol entered into force for the State party unless the violations complained of continue after that date or continue to have effects which in themselves constitute a violation of the Covenant,¹ or an affirmation of a prior violation.² In this light, the Committee notes that, in the claim concerning unlawful pre-trial detention of the author's son I., the relevant domestic proceedings were finalized before 30 September 2009. Therefore, the Committee finds this part of the communication inadmissible *ratione temporis*.

4.4 The Committee further notes that the author has failed to exhaust domestic remedies regarding the unlawful search in his house since he missed the deadline, established by the national law for appealing the relevant decisions before the court, and failed to provide an explanation for the delay.³ The Committee also notes that the author's son E. has not brought up any claims before the domestic authorities and courts. It further notes that I. has not exhausted the available domestic remedies concerning the conditions of detention in prison and the right to vote. It therefore finds these claims inadmissible under article 5 (2) (b) of the Optional Protocol for failure to exhaust domestic remedies.

¹ See, inter alia, communications No. 1367/2005, *Anderson v. Australia*, inadmissibility decision adopted on 31 October 2006, para. 7.3; No. 1633/2007, *Avadanov v. Azerbaijan*, Views adopted on 25 October 2010, para. 6.2; No. 2027/2011, *Kusherbaev v. Kazakhstan*, Views adopted on 25 March 2013, para. 8.2.

² See communication No. 2027/2011, *Kusherbaev v. Kazakhstan*, Views adopted on 25 March 2013, para. 8.2.

³ See communication No. 2135/2012, *Y.Z. v Belarus*, Views adopted on 3 November 2016, para. 7.4.

4.5 As for the authors' claims concerning the torture of I. in police detention on 12 February 2009, the Committee notes that these allegations were investigated by the department of personal safety and considered by the trial court. It also notes that the author has not commented on the outcome of the investigation or the conclusions by the court. Concerning the author's allegations of ill-treatment of I. by police on 10 February 2016, the Committee notes that the author has not provided any information on whether there has been a failure by the authorities to carry an investigation in this connection or what was the outcome of the investigation. The Committee thus finds that the material before it is not sufficient to support these allegations and finds this part of claim inadmissible for lack of substantiation under article 2 of the Optional Protocol.

4.6 The Committee notes the author's claims concerning procedural violations at the stage of investigation and trial, as well as his claims concerning the reduction of the prison sentence for I. and his anticipated release. It recalls that it is generally for State parties' courts to evaluate the facts and the evidence in a particular case, and to interpret domestic law, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice, or that the court failed in its duty to maintain independence and impartiality.⁴ In the present case, the Committee observes that the material before it does not allow it to conclude that the courts proceedings evaluated evidence in an arbitrary manner, or amounted to a denial of justice. The Committee therefore declares this part of the communication insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

4.7 The Committee finally notes the author's claim that I. was not present in the appeal court on 26 October 2009. The Committee also notes that I. was represented by the author. Taking into account that the author has not provided any explanation on why his participation as legal representative of his son deprived I. of a fair trial, given the nature of the specific features of the appeal process, the Committee finds the author's claim that I. absence during the appeal hearing amounted to an unfair trial insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5 (2) (b), of the Optional Protocol;
- (b) That the decision be transmitted to the State party and to the author.

⁴ See, inter alia, communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; and No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6.