The Observatory
for the Protection
of Human Rights Defenders

Public Human Rights Association "Nasha Viasna" v. Ministry of Justice of Belarus

Judicial Observation Report

International Federation for Human Rights

SOS-Torture Network

September
2009

I - Introduction

Kirill Koroteev, *chargé de mission* of the International Federation for Human Rights (FIDH), was mandated by the Observatory for the Protection of Human Rights Defenders, a joint programme of FIDH and the World Organisation against Torture (OMCT), to conduct a trial observation mission in the case of Public Human Rights Association "*Nasha Viasna*" v. Ministry of Justice before the Supreme Court of Belarus. It is worth noting at the outset that Ms. Souhayr Belhassen, President of the FIDH, was refused a visa to observe the trial.

The trial commenced on 10 August 2009 and the judgment was given on 12 August 2009. The judgment is final and is not amenable to an ordinary appeal. The task of the *chargé de mission* was to assess not only the degree of fairness of the trial, but also the reasons given by the authorities to refuse registration of the NGO as this analysis forms part of the test of proportionality of interference with the rights of peaceful assembly and association, as guaranteed, e.g., by Article 22 of the International Covenant on Civil and Political Rights (ICCPR).

II - Brief historical background

The trial concerned the challenge of the refusal of registration of one of the leading human rights groups in Belarus. It used to be named Human Rights Centre "*Viasna*" ("Spring") before its dissolution by a court order in 2003. Seized of an individual communication, the UN Human Rights Committee in *Belyatsky et al. v. Belarus*[1] took the view that the 2003 dissolution violated Article 22 of the ICCPR. The group continued to work without recognition of its legal personality, even though it is a crime under article 193-1 of the Criminal Code of Belarus to participate in an unregistered organisation. It reapplied for registration twice in 2007 and 2009 under the name of "*Nasha Viasna*" ("Our Spring"; it is illegal to use the name of a dissolved organisation). Both applications were refused by the Ministry of Justice and the Supreme Court dismissed the complaints against the decisions of the Ministry[2].

Under Belorussian law, every non-profit organisation must be registered with the Ministry of Justice and obtain legal personality. it is only under this condition that it may legally operate, receive and spend funds (even though receiving funds is practically impossible for a human rights NGO in Belarus because of the existing financial regulations), formally employ staff, etc.

The present case concerned the third application of the group to be registered by the Ministry of Justice. More than 70 of its members applied to the Ministry on 29 March 2009 and on 25 May 2009 the application was dismissed. The Ministry provided four reasons for its refusal:

- Firstly, it argued that four members of the group provided incorrect or false information on their addresses and places of work.
- Secondly, it did not treat the letter of guarantee for the NGO's future premises as

1. Communication no. 1296/2004, 27 July 2007. The UN HRC used Russian version of the applicant's surname and the one used here is Belarusian. In this report Mr. Belyatsky and Mr. Byalyatskiy is the same person.
2. See Annual Report 2009 of the Observatory as well as Urgent Appeals BLR 001/ 0309/OBS 038 , 038 .1 and 038.2.

legally valid and argued that it was not possible for the authorities to visit the premises themselves.
- Thirdly, it blamed the founders of the group for not having sent the Program of Action reportedly adopted by them to the Ministry despite the Ministry's requests to do so.
- Fourthly, it noted that the NGO's name "*Nasha Viasna*" was contrary to its Statute. It further noted that the NGO's founders had engaged in illegal activities in their past, and had been brought to justice for "administrative offences".

Three of the founders of "*Nasha Viasna*", Mr. **Ales Bialiatski** (Chairman), Mr. **Uladzimer Labkovich**, and Mr. **Valyantsin Stefanovich**, challenged the refusal in the Supreme Court of Belarus. They argued that:
- What the Ministry called misleading information on the identities of the founding members was merely a number of clerical errors,
- The letter of guarantee was valid and had raised no objections on behalf of the Ministry in previous proceedings,
- No Program of Action had been adopted at the founders' meeting
- Other objections raised by the Ministry had had no basis in law.

III - The trial

On 10 August 2009 public hearings commenced before Mr. Anatol Tserakh, judge of the Supreme Court, sitting as single judge. All three applicants were present throughout the proceedings. They were not represented, but two of them are lawyers (Mr. Labkovich and Mr. Stefanovich). The Ministry of Justice was represented by one of its lawyers, Mr. Aliaksandar Kharyton. A prosecutor of the Office of the Prosecutor-General in the rank of lieutenant-colonel participated in the proceedings *ex officio*. Only the prosecutor was allowed to sit at a table in the courtroom, the parties were sitting on the front bench of the benches reserved for the public. Up to 30 members of the public were present, including some of "*Nasha Viasna*" members, representatives of foreign embassies and journalists.

The first day of hearing was divided between the opening statements of the parties, questioning of a witness, studying the contents of the case-file, and pleadings on the merits of the case. On the second day the prosecutor presented her conclusions and the parties replied to each other's pleadings.

At the outset of the proceedings Mr. Labkovich asked the judge to order the representative of the Ministry of Justice to limit the latter's submissions to the grounds of refusal of registration set out in the Civic Associations Act and not to invoke any irrelevant considerations like the allegedly illegal activities of the NGO's founders. The judge appeared to accept that the respondent's submissions should be limited to the applicants' grounds of appeal, but did not prevent Mr. Kharyton from making extensive references to the applicants' personal backgrounds.

1. The applicants' arguments:

Minor details abusively considered as "misleading information"

During his opening statement, Mr. Stefanovich noted that what was called "misleading information on the founders" was that one of them indicated his place of work as "secondary school no. 1" rather than "institution of secondary education – secondary school no. 1" and another indicated that he was "director of a group" rather than "director of a section" in an

educational institution. As regards the Program of Action requested by the Ministry, Mr. Stefanovich maintained that neither such document had been adopted, nor was its adoption required under the law. As regards the applicants' allegedly illegal activities (which consisted of minor road traffic offences), he argued that this was not a ground for refusal of registration provided in the Civic Associations Act.

Conformity of the NGO name with the law

Mr. Labkovich further argued that the NGO's name was in conformity with the law, as it made reference to the non-profit nature of the organisation and its field of activities (human rights). He also argued that the Ministry's criticism of "Nasha Viasna" was completely unfounded.

The letter of guarantee

As regards the letter of guarantee, it was stressed that the Ministry had had no objections to the same letter in two previous sets of proceedings, and that the owner of the premises only received a phone call from the local authority while he was away and could not come and open the premises in time for the inspection. It was further added that together with the letter of guarantee was submitted to the Ministry the technical description of the premises drawn up by the State Bureau for Technical Regulation, meaning that no further inspection was needed.

When asked by the judge and by the representative of the Ministry of Justice as to how the Ministry could check the veracity of the letter of guarantee, Mr. Labkovich replied that the prosecutor's office was authorised by the law to intervene in private premises in certain cases and that the Ministry should have conducted the inspection via the prosecutor's office rather than via the local authorities.

2. The Ministry's arguments:

The representative of the Ministry of Justice, Mr. Kharyton, reiterated that one of the founders indicated that he had been working for the JSC "Travers" rather than for the LLC "Travers" and referred also to the two above-mentioned mistakes. It further objected to the name of the organisation. According to Mr. Kharyton, because of the fact that the word "*Viasna*" ("Spring") was written with a capital letter, it did not refer to the season but to another specific concept known only to the NGO's founders. He further stated that it was unclear from the documents available to the Ministry whether the NGO's to-be-premises had an entrance, so existed the need for the inspection which could not have been conducted because of the owner's failure to cooperate. Also he had asked for the Program of Action to be provided because it had been adopted by the founders according to the reports on their web-site www.spring96.org

When asked by Mr. Labkovich whether he was aware of the UN Human Rights Committee's conclusions in *Belyatsky et al. v. Belarus*, Mr. Kharyton replied that this communication concerned the events of 2003 and did not relate to the case at hand. Mr. Labkovich insisted that Mr. Kharyton name the legal provision on the basis of which the Ministry had decided that the letter of guarantee was invalid, but Mr. Kharyton declined to answer. When asked which provisions of the NGO Statute were violated by the name "*Nasha Viasna*", he replied 'all' for the reason that the Statute contained no explanation of what "*Nasha Viasna*" was. When Mr. Stefanovich asked him why the Ministry had not granted an extension of the time-limit so that the applicants would be able to correct the mistakes made, Mr. Kharyton replied that it was a right not an obligation of the Ministry.

Mr. Kharyton concluded by saying that the founders of the NGO had violated not only the laws of Belarus, but also the laws of foreign states having been expelled from Moldova during the parliamentary elections in July 2009, but failed to refer to specific decisions of the Moldovan authorities when asked to do so.

3. The witness' arguments:

The owner of the premises guaranteed to "*Nasha Viasna*" if it obtained registration was called to testify as a witness. He confirmed that he owned the premises and that he only received a phone call informing him of the required inspection one hour in advance from a person unknown to him and that he asked that the reasons be provided to him in writing. On the letter of guarantee itself, when asked by Mr. Kharyton whether he was aware that two regulations on keeping the books of *legal persons* required any letter to bear the person's legal address and contact details, the witness replied in negative. Mr. Kharyton later admitted that he withheld these two regulations from the documents of the parties to the proceedings (Mr. Labkovich denounced this as a violation of the principle of equality of arms), and when the applicants noted the regulations' inapplicability to the present case because the owner of the premises was a natural rather than legal person, the representative of the Ministry of Justice replied that the instructions applied to natural persons 'by analogy'.

4. Back to the applicants' arguments

During the pleadings Mr. Stefanovich denounced the discriminatory approach of the Ministry of Justice, which consisted in repeated refusals to register human rights NGOs. He noted that all the documents required by law had been submitted to the Ministry and that no Program of Action, which was requested by the Ministry, had ever been adopted.

Mr. Labkovich noted that the Ministry of Justice divided the grounds of refusal as having been legal and non-legal. He admitted that three of more than 70 founders had made minor mistakes in their place of work, but that had no bearing on the founders' rights to create an NGO. He denounced the Ministry's objections against the NGO's name as having been more Kafkian rather than legal and the Ministry's approach which only consisted in creating as many obstacles for the NGO as possible. Replying to Mr. Karyton's remarks on the applicants' personality and their "illegal activities" Mr. Labkovich recalled that a number of States like the USA, the EU and Ukraine had excluded the representative of the Ministry of Justice from their respective territories.

According to Mr. Byalyatski, the Ministry did not want a civilised dialogue between the authorities and the civil society. He claimed that no national human rights NGO had been registered in the last 10 years and that, for example, Armenia had 10 times more non-profit organisations *per capita* than Belarus. He alleged violations of the Constitution of Belarus and the ICCPR in the case at hand, having referred to the UN HRC's conclusion in the "*Viasna*" dissolution case. The UN HRC awarded the applicants a remedy of re-registration of their NGO, but nothing had been done by the authorities to make good the violation of the ICCPR. After the international attention had been drawn to the NGO's situation by the European Parliament, the PACE, and in the framework of the EU-Belarus human rights dialogue, the case ceased to concern only the applicants' personal situation, but rather related to the implementation by Belarus of its international commitments.

5. The replies of the Ministry

Mr. Kharyton replied that the conclusions of the UN "Commission on Human Rights" were only recommendations, that the applicants had no one to blame for their mistakes but themselves and that it was not the Ministry's task to correct those mistakes, which had been acknowledged, according to him, by the applicants.

Exercising their right to reply, the applicants denounced the excessively formalist approach of the Ministry of Justice to their application for registration and the lack of impartiality on the Ministry's behalf.

During the replies the representative of the Ministry of Justice accused Mr. Bialiatski of receiving great amounts of money from international sponsors to travel abroad and thanked God for living in 'blue-eyed' Belarus, further claiming that he had nothing to do in Ukraine, the EU or the US.

IV - The judgment

The prosecutor was the last to intervene during the pleadings at the beginning of the second day of the hearings. She limited her remarks to support of the Ministry's refusal on the grounds of incorrect information about the NGO's founders and of the impossibility to visit the to-be-premises of "*Nasha Viasna*". The prosecutor opined that these drawbacks were enough to refuse the registration of the organisation and to dismiss the appeals. The prosecutor did not address the parties' arguments given in the proceedings and the applicants' references to the Constitution and the ICCPR, which was denounced by the applicants during their replies.

When the Court gave its judgment, it followed the prosecutor's conclusions. The judge dismissed the Ministry's reliance on the 'illegal activities' of the applicants, its objections to the name of the organisation and the failure to present a Program of Action. However, it upheld the Ministry's decision on the grounds of incorrect information about the founders and of their having impeded the Ministry's check of premises mentioned in the letter of guarantee. The judge did not address the applicants' arguments under the Constitution and the ICCPR.

No ordinary appeal lies against the judgment. It may only be called into question by the President of the Supreme Court of Belarus or his deputies by way of the proceedings for supervisory review.

V - Analysis

Several aspects of the trial call for comment.

Firstly, it must be noted that the parties had ample opportunity to present their arguments. The judge allowed the parties to put questions to each other without any restrictions, to present evidence and to reply to each other's and the prosecutor's pleadings. From this point of view, the parties enjoyed equality of arms and the judge cannot be said to have been subjectively partial.

Secondly, however, the applicants' opponents were not limited to the representative of the Ministry of Justice whose decision they challenged before the Supreme Court. The prosecutor was their opponent as well, as she concluded in the Ministry's favour without discussing the parties' arguments at all. The prosecutor participated in the proceedings *ex officio*, the Code of Civil Procedure of Belarus thus allowed two state agencies, both of which defend the executive, to take part in the proceedings. Also, despite his subjective impartiality, the judge was the applicants' opponent. As it has been shown elsewhere, the Code on Judiciary and Status of Judges of Belarus expressly provided that the recruitment of judges, their career, legal training, disciplinary liability and dismissal, depend on the Ministry of Justice (respondent in the present case)[3]. Thus, it cannot be said that the judge and the Court were objectively independent and impartial.

Thirdly, as regards the merits of the judgment, it must be noted that even if the irregularities in the documents submitted by "*Nasha Viasna*" for official registration were of the kind to permit the refusal under the Civic Associations Act of Belarus, this is not enough to justify the authorities' interference with the applicants' right to association. Indeed, both under the Constitution of Belarus and the ICCPR the interference must pursue a legitimate aim. It has not been shown in the proceedings and in the judgment that the refusal to register "Nasha Viasna" pursued any of the aims set out in the Constitution of Belarus (article 23) or in the ICCPR (article 22(2)). Further, under the latter provision of the ICCPR, the interference must be necessary in a democratic society, that is, *inter alia*, proportionate to the legitimate aim pursued. Particularly convincing reasons must be given to justify the interference, bearing in mind that in Belarus it is a crime to participate in an unregistered association. In the present case, the reasons advanced by the prosecutor in her conclusions and by the judge in the judgment could hardly be treated as convincing and compelling. Indeed, when a founder indicates that her employer is "secondary school no. 1" rather than "institution of secondary education – secondary school no. 1" this does not mean any criminal intent, just as the request made by the owner of the NGO's to-be-premises to provide written reasons for the inspection, rather than an unconditional order, from an unauthorised person on telephone does not imply the founders' moral turpitude. Never has it been established that the founders of "Nasha Viasna" has called for violence or engaged in criminal activity. Rather, the authorities' decision makes them criminals. But no analysis of proportionality has been provided in the judgment.

Fourthly, it must be born in mind that the UN Human Rights Committee (UN HRC) had already found a violation of Article 22 of the ICCPR in *Belyatsky et al. v. Belarus* on account of the dissolution of the original "*Viasna*" in 2003. It ordered the authorities to provide the applicants with compensation and remedies including the new registration of the NGO. However, the Belarusian authorities opted to treat the UN HRC's conclusions as being merely recommendations and failed to implement its Views. But the ICCPR guarantees minimum inalienable rights, so whatever way the UN HRC's Views are treated, there's no other way to comply with the ICCPR than to give effect to its Views. The ICCPR has been wholly disregarded, though.

Finally, it must be noted that the applicants mainly relied on the illegality of the Ministry's actions, their being contrary to the Civic Associations Act and only in a subsidiary manner on the violation of their rights guaranteed by the Constitution and the ICCPR. But even if they had based their entire case on the Constitution and the ICCPR, the result would have been the same: the Supreme Court judge was only empowered to decide whether the Ministry had a ground to refuse the registration rather than to assess the human rights implications of the refusal.

3. See, e.g., the FIDH report "Conditions of Detention in the Republic of Belarus", June 2008, pp. 12-14.

VI - Comments

The Chairman of "*Nasha Viasna*" and one of the applicants, Ales Bialiatski, said that political reasons stood behind the judgment of the Supreme Court, which had little in common with justice and the rule of law. The claims of liberalisation of the regime were not supported by the required actions and Belarus remained a country dangerous to human rights activists, Mr. Bialiatski added.

For the reasons set out above, the *chargé de mission* denounced the trial as having been a shame for the Belarusian justice, but pointed out that Belarus has already got accustomed to such kind of shame.

Recommendations

1 – To the Belarusian authorities

- Guarantee in all circumstances an enabling environment for human rights defenders and put an end to any hindrance against their activities, and to any kind of harassment against them, in conformity with the Declaration on Human Rights Defenders, adopted by the UN General Assembly in 1998;

- Conform in all circumstances with international standards on freedom of association provided in the ICCPR and in the 1998 UN Declaration on Human Rights Defenders;

- Conform with the reasoning and recommendations made in the Communication *Belyatsky et al. v. Belarus* of the UN Human Rights Committee no. 1296/2004 of July 27, 2007;

- Implement the recommendations of the UN Human Rights Committee and other UN treaty bodies as well as those of the UN Human Rights Council's special procedures;

- Guarantee the independence of the judiciary, i.e. by establishing proper rules regarding the process of appointment, promotion and dismissal of judges;

- Issue a standing invitation to UN special procedures, and reply positively in particular to the request to visit by the then Special Representative of the UN Secretary General on the situation of human rights defenders in 2003;

- Cooperate fully with the OSCE mechanisms on Human Dimension, notably the Office of Democratic Institutions and Human Rights, and with the OSCE office in Minsk;

- Conform with the OSCE Human Dimension commitments in particular in the field of rule of law, civil and political rights, and civil society;

2 – To the European Union

- Address the issue of the independence of the judiciary and freedom of association in the framework of dialogues at various levels with the authorities of Belarus and especially on the occasion of EU troïka meetings with Belarussian authorities;

- Address the issue of human rights defenders and arbitrary restrictions to local NGO's activities and existence relying on the EU Guidelines on human rights defenders;

3 – To the OSCE

- The OSCE office in Minsk should pay special attention to the issue of human rights defenders and freedom of association;

- The OSCE Parliamentary Assembly should invite its Belarusian members to take the relevant legislative initiatives to bring domestic law in conformity with international human rights standards.

fidh
International Federation for Human Rights

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OMCT
SOS-Torture Network

Created in 1986, the World Organisation Against Torture (OMCT) is today the main coalition of international non-governmental organisations (NGO) fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. With 282 affiliated organisations in its SOS-Torture Network and many tens of thousands correspondents in every country, OMCT is the most important network of non-governmental organisations working for the protection and the promotion of human rights in the world.

Based in Geneva, OMCT's International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programmes allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. In the framework of its activities, OMCT also submits individual communications and alternative reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights.

OMCT enjoys a consultative status with the following institutions: ECOSOC (United Nations), the International Labour Organization, the African Commission on Human and Peoples' Rights, the *Organisation Internationale de la Francophonie*, and the Council of Europe.

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a joint programme

The Observatory
for the Protection
of Human Rights Defenders

Activities of the Observatory

The Observatory is an action programme based on the belief that strengthened co-operation and solidarity among defenders and their organisations will contribute to break the isolation they are faced with. It is also based on the absolute necessity to establish a systematic response from NGOs and the international community to the repression against defenders.

With this aim, the Observatory seeks:

a) a mechanism of systematic alert of the international community on cases of harassment and repression against defenders of human rights and fundamental freedoms, particularly when they require an urgent intervention;
b) the observation of judicial proceedings, and whenever necessary, direct legal assistance;
c) international missions of investigation and solidarity;
d) a personalised assistance as concrete as possible, including material support, with the aim of ensuring the security of the defenders victims of serious violations;
e) the preparation, publication and world-wide diffusion of reports on violations of the rights and freedoms of individuals or organisations working for human rights around the world;
f) sustained action with the United Nations (UN) and more particularly the Special Representative of the Secretary General on Human Rights Defenders, and when necessary with geographic and thematic Special Rapporteurs and Working Groups;
g) sustained lobbying with various regional and international intergovernmental institutions, especially the African Union (AU), the Organisation of American States (OAS), the European Union (EU), the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe, the International Organisation of the Francophonie (OIF), the Commonwealth, the League of Arab States and the International Labour Organisation (ILO).

The Observatory's activities are based on the consultation and the cooperation with national, regional, and international non-governmental organisations.

With efficiency as its primary objective, the Observatory has adopted flexible criteria to examine the admissibility of cases that are communicated to it, based on the "operational definition" of human rights defenders adopted by OMCT and FIDH: "Each person victim or at risk of being the victim of reprisals, harassment or violations, due to his compromise exercised individually or in association with others, in conformity with international instruments of protection of human rights, in favour of the promotion and realisation of the rights recognised by the Universal Declaration of Human Rights and guaranteed by several international instruments".

To ensure its activities of alert and mobilisation, the Observatory has established a system of communication devoted to defenders in danger.

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