

**Belarus: Condemnation of leaders of an independent trade union:
another blow to freedom of association*****Case Belarus v. Henadz Fiadynich and Ihar Komlik******Introduction***

Starting on July 30, 2018, up until August 17, 2018, the trial of two leaders of the Belarusian Independent Trade Union of Radio and Electronic Industry Workers (REP) took place in the Saviiecki District Court of Minsk, Belarus. The two independent trade union leaders, Messieurs **Henadz Fiadynich** and **Ihar Komlik**, respectively Chairman and Chief Accountant of REP, were charged with tax evasion for having, in 2011-2012, received up to 140,000 EUR into a foreign bank account in neighboring Lithuania, withdrawn the funds and transported the cash back to Belarus, with the help of colleagues, and for having failed to declare the receipt of such funds as income resulting in the failure to pay around 22,867 thousand Belarus rubles (approximately 9,790 EUR). The judgment was delivered on August 24, 2018. Defendants were found guilty of all charges, sentenced to four years of restriction of liberty without imprisonment, five years of restriction on holding a senior management position, and a fine of 47,560 Belarusian Rubles (approximately 19,950 EUR).

Lawyer Ilya Nuzov, Head of the Eastern Europe-Central Asia Desk at FIDH, was mandated by the Observatory for the Protection of Human Rights Defenders to conduct a trial observation mission in the Saviiecki District Court. The task of the trial observer was to assess the fairness of the trial, in light of international law standards, such as those embodied in Article 14 (fair trial standards) and Article 22 (freedom of association) of the International Covenant for Civil and Political Rights (ICCPR), to which Belarus is a party, but also to meet with the defendants, defense lawyers, international trade union representatives,

diplomatic observers, Belarus NGOs and other international observers present at the trial, to discuss the proceedings, to determine any concerns with respect to the proceedings other than those observed and recorded by the trial monitor, and to assess the situation of human rights defenders in the country more generally.

Brief background information

The situation of unions in Belarus has not changed significantly since the Soviet times, when they were under the strict control of the State and the ruling communist party.¹ While the dissolution of the Soviet Union and the single-party system allowed for the formation of independent trade unions, the authorities have adopted restrictive laws impeding their formation and activities. For instance, on January 26, 1999, President Lukashenko issued Decree No. 2 “On some measures to regulate the activities of political parties, trade unions, and other non-governmental organizations,” which placed severe restrictions on the ability to form or register trade unions. Moreover, the authorities have constantly interfered in the activities of independent unions, preventing their normal operation, firing active union members and leaders, and forcing rank-and-file members to leave independent unions and move to the state-controlled Federation of Trade Unions of Belarus under threats of dismissal or refusal to enter into or extend labor contracts.²

On June 16, 2000, REP, among other independent unions, filed a complaint with the International Labour Organization Committee on Freedom of Association regarding violation by the republic of Belarus of the fundamental principles enshrined in the ILO conventions. The Committee on freedom of association found that acts of government interference in trade union activities are not permissible and asked the government to present information on eliminating violations in relation to specific trade union organizations and their leaders, including REP, which was one of the unions mentioned in the complaint.

Since then, representatives and members of independent trade union organizations experienced more discrimination, pressure, denial of employment at the end of a term of office for elected union positions, and other forms of pressure and harassment by the authorities. For instance, on March 12, 2001, the President published Decree No. 8, later complemented by Decree No. 24 of November 28, 2003 “On the Receipt and Use of Free Foreign Aid,” which makes it nearly impossible for Belarus NGOs and trade unions involved in human rights and social activism to receive any gratuitous financial assistance from foreign states, organisations or individuals. The decree does not list provision of legal aid or any human rights activity as a permissible use of such funds, and expressly forbids the use of funds for organising demonstrations and other forms of political protest.³ The Observatory recalls that this contravenes international human rights standards that establish that the right to receive funding including from foreign sources is a core part of the right to freedom of association.⁴

The situation of independent trade unions worsened after the 2010 presidential election, when the civil society was subjected to unprecedented repression in the aftermath of widespread social protests. During a search of REP’s headquarters on January 14, 2011, the authorities confiscated almost all the union’s computers, which were later returned in non-working condition. The confiscation of the computers revealed the names of many of its members to security agencies, such as the KGB, and other authorities in charge of ideological work with trade union workers.⁵

¹ FIDH and Viasna, Report, *Forced Labor and Pervasive Violations of Workers’ Rights in Belarus*, December 2013, p. 22.

² *Ibid.* at p. 23.

³ Decree No. 24 of November 28, 2003, Article 4.

⁴ See The Observatory, Annual Report 2013, “Violations of the right of NGOs to funding: from harassment to criminalisation”, available here: http://www.omct.org/files/2013/02/22162/obs_annual_report_2013_uk_web.pdf

⁵ *Ibid.* at p. 28.

During the spring of 2017, REP strongly criticized another Presidential Decree No. 3, “On Prevention of Social Parasitism”, which imposed a fee on the unemployed and partially employed and led to massive protests throughout the country. REP gathered over 45,000 signatures in opposition to the decree, actively participated in so-called “Marches of non-Parasites” and provided legal aid to activists arrested after their participation in the protests against the decree.

On August 2, 2017, officers of the Financial Investigation Department (FID) of the State Control Committee of Belarus raided the offices of REP, seized documents and computers, and arrested Messrs. Fiadynich and Komlik. Although both were eventually released (Komlik spent two months in pre-trial detention), they were charged under Part 2, Article 243 of the Criminal Code for “tax evasion on a large scale.” Under this provision, the defendants faced up to five years of restriction of liberty or three to seven years of incarceration and confiscation of property.

This is not the first time that human rights defenders in Belarus are prosecuted under the pretext of tax evasion for receiving foreign funds through a foreign account. Notably, in 2011, Mr. **Ales Bialiatski**, Chairman of the Human Rights Centre “Viasna” and then FIDH Vice-President, was charged under the same article and subsequently sentenced to four and a half years in prison in a trial that was widely condemned as having been politically motivated and intended to obstruct his work as a human rights defender.⁶ Moreover, the UN Human Rights Committee concluded in 2014 that sentencing of Aliaksandr Bialiatski to imprisonment was a direct consequence of the violation of his right to freedom of association. The Committee thus requested that Belarus, among other actions, take measures to prevent similar violations in the future, namely by reviewing its legislation to ensure its compliance with the requirements of Article 22 of ICCPR. The Views adopted by the Committee have been completely ignored by Belarus in its policies and practices towards independent associations. Legislation abusively restricting the operation of civil society organisations remains in force to date, forcing many organisations to register abroad.

The trial

On July 30, 2018, public hearings commenced before Judge Maryna Fiodarava, judge of Saviecki District Court, sitting as a single judge. The two defendants were present throughout the proceedings, sitting on the front bench of seats reserved for the public, were neither handcuffed nor placed in any confined space such as in the two metal cages located inside the courtroom. Defendants were each represented by a lawyer; Mr. Fiadynich was represented by Ms. **Natalia Matskevitch**, and Mr. Komlik was represented by Ms. **Lyudmila Kazak**. The Office of the Prosecutor-General was represented by two of its Senior assistants to the Prosecutor, Mr. Vadim Kazei and Ms. Irina Orlovskaya. Over 50 members of the public were present on the first day of proceedings, including journalists, representatives of international organisations and foreign embassies, and other human rights defenders and activists. Over the course of the two-week trial, between 20 and 40 individuals attended the proceedings every day.

The State complaint alleged that between January 2011 and March 2012, Messrs. Fiadynich and Komlik, for the purposes of self-enrichment and in violation of, among others, Presidential Decree No. 24 of 28 November 2003 “On the Receipt and Use of Free Foreign Aid” conspired to open a bank account in the name of REP in the “AE SEB bankas” bank in Vilnius, Lithuania, enabling the withdrawal of funds received from foreign organisations, such as the 3F trade union in Denmark, and their transfer to the territory of Belarus without their declaration to the tax authorities or registration as ‘free foreign aid’ with the relevant state authorities. As a consequence, defendants failed to declare 140,000 EUR of income, amounting to a violation of Article 243 part 2 of Belarus Penal Code in the form of failure of REP to pay tax for the fiscal year 2011 in the amount of 22,867 Belarus rubles.

⁶ See, e.g. European Parliament resolution on Belarus: the arrest of human rights defender Ales Bialatski, 14 September 2011, RC\877361EN.doc

The defendants denied all charges and among their arguments they highlighted the fact that the prosecution had failed to establish the existence of the foreign bank account, the receipt of funds, other than for participation of REP in conferences or seminars abroad, or the transfer of any funds from Lithuania to Belarus during the relevant period. The defendants also argued that the applicable legislation and the prosecution were contrary to the applicable international law concerning freedom of association.

The trial lasted 15 days and included the testimony of 27 witnesses and experts, the examination of 11 volumes of written records and phone calls, and the testimony of defendants.

The judgement

By its judgement, pronounced on August 24, 2018, the Saviecki District Court found both Messrs. Fiadynich and Komlik guilty of violations of Article 243.2 of the Penal Code, and sentenced them to four years of restriction of liberty without imprisonment, five years of restriction on holding positions of senior management, and a fine of 47,560 Belarusian Rubles (approximately 19,950 Euros).

The Applicable International Law

Article 14 of the ICCPR, which Belarus ratified, provides that all persons are equal before the court, and that every accused is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Among others, Paragraph 3 of the same further provides that an accused is entitled: “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

Moreover, Article 22 of ICCPR guarantees “the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” Restrictions of this right are only acceptable if they are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Nothing gives the right to States Parties to the ILO Convention No. 87 to adopt legislation to the detriment of the guarantees provided for in that Convention, or to apply the law in such a way as to impair these guarantees.

In accordance with Article 3 of ILO Convention on Freedom of Association and Protection of the Right to Organise (Convention No. 87), which Belarus has ratified, the public authorities should refrain from any interference, which could restrict or impede the lawful exercise of the right of workers and employers to draw up their charters and rules, to freely elect their representatives, to organise their administration and their activities and to formulate their programmes of action. The protection of trade unions and their rights from interference of the government guarantees the rights of individuals to the protection of their economic and social interests.

Analysis

At the outset, it should be noted that the defendants, who were not in State custody before or during the trial, had ample opportunity to meet with their lawyers and to , study, though not copy, case materials prior to the commencement of the trial, and to present their arguments, make motions and statements before the Court, as well as to question witnesses and to object to the form and substance of certain lines of questioning, during the proceedings. Nevertheless, several aspects of the trial fell well short of the fairness standards enshrined in international law, as detailed below.

First, during the proceedings, at least six of the witnesses examined by the parties complained that their pre-trial statements incriminating the defendants were procured through threats, intimidation and other psychological pressure exerted by agents of the FID during the initial interrogations, which took place on or around the raid on August 2, 2017, as well as by agents of the State Investigations Committee in subsequent questionings. For instance, several witnesses reported being expressly or implicitly, such as by calling the convoy, threatened with arrest and/or jail time if a certain version of events presented by the interrogator was not accepted. Some witnesses reported their earlier testimony as having been taken down incorrectly.

On August 9, 2018, Judge Fiodarava ordered an investigation into allegations of psychological pressure of witnesses who changed their testimony in court. Several witnesses were summoned for additional questioning. Strangely, one of the witnesses reexamined during the investigation never claimed that she was pressured by the authorities. On the contrary, she revealed during her earlier in-court testimony that she was a paid KGB informant. It was not clear whether any agents of FID or the State Investigations Committee were questioned during this inquiry. On August 14, 2018, Judge Fiodarava announced that the investigation did not reveal any wrongdoing by agents of the State.

Secondly, while only a few out of the 27 witnesses had any personal knowledge of the facts that took place during the incriminated time period, they were all allowed to testify despite objections by the defense. Moreover, an overwhelming number of objections raised by defense counsel in this and other respects were overruled, without any explanation of the basis for such rulings allowing to suggest a possibility a subjective bias, and consequently a lack of independence, on the part of Judge Fiodarava.

Thirdly, the case was fraught with many procedural violations. The prosecution's case was built around two key pieces of documentary evidence, both procured through unspecified means and not authenticated by a prescribed and transparent procedure. The first was an alleged printout of bank records establishing the existence of a corporate account in the Lithuanian bank and the cash flows from foreign organisations. The latter was not authenticated by the bank in question. The second was an email account that contained these bank records, as well as incriminating emails from alleged foreign funders, such as the Danish trade union 3F. However, the prosecution failed to provide evidence during the trial linking the given email account to any of the defendants. During the Skype questioning of an employee of the financial police officer Siarhei Dzmitryeu, who was excused from making a courtroom appearance for questionable security reasons and was therefore not visible to the public, the witness refused to provide any specific information regarding how the evidence was collected or how the email account was accessed, referring in general terms to the course of 'investigative work.' Hence, no information was given as to IP address that was used to create the email account, verification of email account owner and date of email account creation. These facts weigh very heavily on the reliability, and hence probative value, of such evidence, particularly since Lithuanian authorities did not provide information on bank accounts belonging to Messrs. Komlik and Fiyadynich or to REP.

Moreover, it has emerged through the proceedings that the request for surveillance of Messrs. Komlik and Fyadynich was authorised by the Court as of July 15, 2017. However, transcripts of phone conversations that were accepted as evidence by the Court reflected that they were recorded prior to that date, indicating that they were obtained unlawfully and should have been stricken from the trial record.

These procedural violations, which were disregarded by the Court in favor of the prosecution, resulted in an unfair advantage to the State authorities in the form of unreliable and unauthenticated evidence likely procured through unlawful means violated the principle of equality of arms and undermined the ability of defendants to prepare an adequate defense.

Taken together, these violations tend to demonstrate that the trial did not comply with the fairness standards enshrined in Article 14 of the ICCPR.

Moreover, the impugned conduct, and the activities of REP more generally, must be regarded in light of the historical context and legislation in Belarus targeting the activities of associations against international law standards. Under Article 22 of the ICCPR, the legislative interference into the right to form an association may only be justified if proportionate to the legitimate aim pursued. It means that particularly convincing reasons must be given to justify the interference. Furthermore, according to international standards the right to access funding is an integral part of the right to freedom of association – itself a universally recognised right enshrined in numerous international and regional instruments. From a legal perspective, legitimate restrictions on the right of access to funding are the same as those admitted with regard to the right to freedom of association: they are only authorised under strict and cumulative conditions. They must be “prescribed by law” and “necessary in a democratic society”, and respect the primacy of the general interest and the principle of proportionality.

Indeed, the UN Working Group on Arbitrary Detention, in its Opinion on the case of Ales Bialiatski involving identical charges, determined that Article 22 not only contains negative obligations for States not to interfere with the activities of civil society organisations, but also positive obligations to facilitate the associations’ objectives through public funding or through the exemption from taxes on funds received by associations from foreign States or entities.⁷

Decree No. 24 of November 28, 2003 “On the Receipt and Use of Free Foreign Aid,” the avoidance of which was invoked numerous times during the proceedings by the prosecution as the *raison d’être* for the defendants’ alleged scheme, runs contrary to the standards espoused in Article 22 of the ICCPR, as well as those in Convention 87. The list of permissible uses of such foreign aid in the Decree does not include activities related to the protection and promotion of human rights, and any attempt to register the receipt of such funds with the authorities would likely result in their confiscation or severe restrictions on their use. This restriction renders it extremely difficult for REP and other civil society organisations to receive public funding and thus to obtain sufficient resources to manage their operations effectively, particularly in the area of provision of legal and social aid to activists and human rights defenders. State interference therefore places severe restrictions on the choice of activities of REP and other trade unions, and their financial wherewithal. On the other hand, State authorities have not, and are unable to, proffer any legitimate aim that such a legislation pursues, rendering its interference unnecessary and thus disproportionate, to any legitimate social need.

Conclusion

On August 24, 2018, Messrs. Henadz Fiadynich and Ihar Komlik, respectively Chairman and Chief Accountant of the Belarusian Independent Trade Union of Radio and Electronic Industry Workers (REP), have been found guilty of tax evasion charges by the Saveiecki District Court of Minsk, Belarus. The prosecution alleged that the two leaders of the independent trade union are guilty of not declaring 140,000 EUR allegedly received through a corporate bank account in Lithuania. Charges were brought against them a year after the trade union helped to mobilize protests against Presidential Decree No. 3 that established a fee on the unemployed.

The Observatory for the Protection of Human Rights Defenders mandated a trial observation mission on July 30, 2018, the day of the opening of the trial. Assisted by the Human Rights Centre “Viasna”, the Observatory followed the trial closely until the final judgement that sentenced Messrs. Fiadynich and Komlik to four years of of restriction of liberty without

⁷ United Nations Human Rights Council, Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27-31 August 2012, Opinion No. 39/2012 (Belarus).

imprisonment, five years of restriction on holding a post in public service, and a fine of 47,560 Belarus rubles.

The report concludes that serious procedural violations were committed during the judicial proceedings, thus violating Messrs. Fiadynich and Komlik's right to a fair trial. First, six witnesses declared in court that their testimonies were obtained using threats and psychological torture. Second, as key evidence the prosecution presented unauthenticated bank records obtained through an email account, the ownership of which was not established during trial. Third, the Court accepted as evidence transcripts of phone conversations recorded prior to the authorisation to put Messrs. Fiadynich and Komlik under surveillance.

These procedural violations resulted in violation of the principle of equality of arms giving the prosecution an advantage by accepting unreliable and unauthenticated evidence that was likely procured using unlawful means.

The trial against should be analysed in the wider context of the human rights situation prevailing in Belarus. In 2011-2014, President of the Human Rights Centre "Viasna" and then Vice-President of FIDH Ales Bialiatski spent three years in prison following a similar politically motivated trial on tax evasion charges. Subsequently, the UN found his imprisonment arbitrary and requested the authorities to compensate Ales Bialiatski and reform national legislation regulating freedom of association. None of the UN requirements were implemented by the Belarusian authorities. Independent civil society, including independent trade unions, face repressive legislation adopted with an aim to sanction government critics. In the context of the mass protests in spring 2017, the opening of the criminal case against REP leaders in August 2017 suggests that their persecution is likely to be a sanction for their role in the eventual suspension of the enforcement of the Presidential Decree No. 3 on the unemployed and partially employed.

The Observatory therefore believes that the conviction of Messrs. Fiadynich and Komlik violate Belarus' obligations under international human rights law and its own Constitution, and that the convictions should be overturned on appeal.

The Observatory for the Protection of Human Rights Defenders (the Observatory) was created in 1997 by FIDH and the World Organisation Against Torture (OMCT). The objective of this programme is to intervene to prevent or remedy situations of repression against human rights defenders. FIDH and OMCT are both members of [ProtectDefenders.eu](https://www.protectdefenders.eu), the European Union Human Rights Defenders Mechanism implemented by international civil society.

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