

OPINION No. 37/2005 (BELARUS)

Communication addressed to the Government on 25 October 2004.

Concerning Mr. Mikhail Marynich.

The State is a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of opinion No. 20/2004.)
2. The Working Group conveys its appreciation to the Government for having submitted information concerning the case.
3. (Same text as paragraph 3 of opinion No. 20/2004.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. It has transmitted the reply provided by the Government to the source, which provided the Working Group with its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. According to the information received, Mr. Mikhail Marynich is a citizen of Belarus, born on 13 January 1940. In 1990, he was elected a member of the Parliament of Belarus. During his career he was also, among others, Mayor of Minsk, Ambassador to the Czech Republic, Hungary, Latvia and Slovakia, and, from 1994 to 1998, Minister of Foreign Economic Relations. In 2001 Mr. Marynich unsuccessfully ran for President of the Republic. In October 2001 he became President of the association Delovaya Initsiativa (Business Initiative).

6. It was reported that on or immediately before 18 April 2004, unknown persons broke into Mr. Marynich's country cottage in the village of Zatsen, Minsk region. Later, a gun and ammunition will be found there and confiscated by investigators, on which the charge of illegal possession of arms will be based.

7. On 26 April 2004, Mr. Marynich was apprehended by members of the State Security Committee (KGB) and placed in the KGB pretrial detention centre in Minsk. At around 11.30 p.m. the same day, he was presented with a decision of the Minsk Public Prosecutor ordering his detention. On 27 April 2004, a criminal investigation was opened against Mr. Marynich in relation to charges under articles 295 (2) (illegal purchase and possession of arms) and 377 (theft of a document containing a State secret) of the Criminal Code. On 29 April 2004, the Prosecutor issued a decision ordering his pretrial detention. On 6 May 2004, the Prosecutor formally charged Mr. Marynich with a violation of article 295 (2) of the Criminal Code. On 25 June 2004 the Prosecutor prolonged the pretrial detention of Mr. Marynich until 26 August 2004.

8. Mr. Marynich's lawyer submitted to the KGB a request to terminate the criminal proceedings against him. This request was rejected on 6 August 2004. Mr. Marynich appealed this decision to the Minsk Prosecutor, who rejected the appeal on 20 August 2004.

9. Also on 20 August 2004, an investigation was opened against Mr. Marynich in relation to a possible violation of article 210 (4) of the Criminal Code. He was suspected of stealing office equipment lent by the United States Embassy in Minsk to the association Delovaya Initsiativa. On 26 August 2004, the Prosecutor prolonged the detention of Mr. Marynich for another month, this time on the basis of the charges under article 210 (4) of the Criminal Code.

10. On 23 September 2004, Mr. Marynich was formally charged with violations of article 295 (2), article 377 (2) and article 210 (2) of the Criminal Code. On 24 September 2004, the Prosecutor ordered his pretrial detention to be prolonged until 26 September 2004. However, since 26 August 2004, no further investigative activity has reportedly taken place.

11. On 2 September 2004, the Central District of Minsk Court ruled to dismiss a motion for release by Mr. Marynich. On 7 September 2004, an appeal against the decision of the

Central District of Minsk Court was rejected. Moreover, since Mr. Marynich was detained, he has lodged with the KGB Investigations Department, the Minsk Prosecutor and the Belarus General Prosecutor more than 70 motions against his detention. They were all dismissed.

12. The source alleges that the detention of Mikhail Marynich is arbitrary for the following reasons:

- (a) The charges against him are manifestly devoid of any substance. In particular:
 - (i) As to the charge of illegal possession of weapons, the fingerprints on the arms confiscated at his country cottage are not identifiable, and it is obvious that persons have broken into the cottage, tampering with various objects but not stealing anything. All this suggests that the evidence found in the country cottage was fabricated;
 - (ii) Regarding the charge of theft of a document containing a State secret, the document on which these charges are based (a document of the Council of Ministers of 14 May 1998 entitled "Constitution of the Economic Problems Committee of the Ministry of Economy of Belarus") does not contain any State secrets as they are defined by the relevant law. Moreover, the source states that the statute of limitations for this crime (five years) had expired at the time of Mr. Marynich's arrest;
 - (iii) Regarding the charge of theft of office equipment, members of the association Delovaya Initsiativa have clarified, in the course of interrogation by the investigators, that the storage of the office equipment in Mr. Marynich's garage was agreed as a solution to the temporary lack of office space at the premises of the association;
- (b) The proceedings against Mr. Marynich gravely violate the right to a fair trial. In particular:
 - (i) Since the constitutional and legislative changes in 1996, the judiciary in Belarus is not independent. In this respect, the source refers to the findings made by the former Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, in the report on his visit to Belarus in June 2000 (E/CN.4/2001/65/Add.1). This report states, inter alia, that "guarantees of independence are systematically undermined by the Government's and, in particular, the President's attitude to the judiciary" (para. 36); "Executive control over the judiciary and the manner in which repressive actions are taken against independent judges appear to have produced a sense of indifference among many judges regarding the importance of judicial independence in the system" (para. 108); and "The Special Rapporteur also believes that the constant monitoring of the activities of the judiciary is intended to intimidate members of the judiciary into deciding all cases in line with the Government's wishes, rather than in accordance with the law and the evidence" (para. 109).

- (ii) The court hearings concerning Mr. Marynich's applications for release from pretrial detention were conducted in closed session, in the absence of Mr. Marynich and his lawyer, thus depriving Mr. Marynich of the right to a public hearing enshrined in article 10 of the Universal Declaration of Human Rights and article 14 (1) of the International Covenant on Civil and Political Rights.

13. The source adds that the jurisdiction of a court with respect to review of a Prosecutor's decision ordering detention is limited to reviewing the formal correctness of the decision. The procedure for review of pretrial detention orders outlined in the Criminal Procedure Code, as applied in the case of Mr. Marynich, is not, according to the source, in compliance with article 9 (4) of the International Covenant on Civil and Political Rights, which provides that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention ..."

14. The source further states that the detention regime of persons in pretrial detention is decided by the investigating agency which, in the case of Mr. Marynich, is the KGB. Mr. Marynich's contacts with the outside world are severely restricted. In the course of its visit to Belarus from 16 to 26 August 2004, the Working Group requested to visit him, but its request was denied.

15. In its reply, the Government stated that the search of Mr. Marynich's residence was made in connection with the discovery of counterfeit foreign currency in his motor vehicle and it resulted in the seizure of a pistol and documents. The initial inquiry agencies of the KGB detained Mr. Marynich pursuant to article 108 of the Criminal Procedure Code (detention on direct suspicion of the commission of an offence) and a criminal case was initiated against him on the basis of articles 295 (2) and 377 (2). On 29 April 2004, the Prosecutor of Minsk chose detention in custody to be applied as a preventive measure and on 6 May 2004 Mr. Marynich was charged with committing illegal acts involving a firearm (art. 295 (2)). On 26 October 2004, the Prosecutor extended Mr. Marynich's period of detention in custody to seven months.

16. The Government added that furthermore, it was established that as President of the so-called "Belarusian Association Business Initiative", Mr. Marynich planned to appropriate property - 40 items of computer and other office equipment - received on 4 December 2002 by his organization from a foreign State for temporary use free of charge. It is stated that Mr. Marynich did not apply to the competent authorities for the registration of this property under the established procedure, nor did he request the appropriate certification. He did not enter this property in his organization's accounts and, using his official powers, intentionally appropriated the property, worth a total of 21,440,944 Belarusian rubles, without payment.

17. On 20 August 2004, the KGB opened a criminal case against Mr. Marynich under article 210 (4) (embezzlement through abuse of office), and in November 2004 brought another case based on indication of an offence under article 377 (1) (theft or damage of documents, stamps and seals); these cases were joined with the criminal case initiated under article 295 (2)

(illegal acts involving a firearm, ammunition and explosives). On 10 November 2004, the charges under article 377 (1) were dropped on the basis of article 29 (1) and (3) (circumstances excluding proceedings in a criminal case).

18. By a judgement of the Minsk District Court of 30 December 2004, Mr. Marynich was acquitted under article 295 (2), for failure to prove his participation in committing the offence, and found guilty under article 210 (4) (embezzlement through abuse of office). The Court sentenced him to five years' deprivation of liberty in a strengthened-regime correctional colony, with confiscation of property and deprivation of the right to exercise certain duties or undertake certain activities in institutions, organizations or enterprises for three years.

19. The Government concluded its response by providing general information on the implementation of the principle of the rule of law in Belarus and commenting on the report of the Working Group on the restriction of the right to challenge the legality of detention before a court.

20. The source, rebutting the response from the Government, argues the following.

21. The car Mikhail Marynich was driving on the day of his arrest was stopped by a policeman without any reason, since he did not violate any traffic rules. The search of his car was carried out without any authorization.

22. A criminal charge was brought against Mikhail Marynich relating to article 377 and article 295, part 2, of the Criminal Code (storage of arms) after a gun was found in his summer house. However, there were clear traces of someone having broken into the house. Mr. Marynich's fingerprints were not found on the gun. These two facts prove that Mr. Marynich had nothing to do with it. The Government states that some documents were found during the search. Those were copies of documents, not the originals, as well as personal files of Mikhail Marynich, which are not of importance to the State.

23. On 29 April 2004, the Deputy Prosecutor General of the Minsk region issued an order to arrest Mr. Marynich. According to article 126 of the Criminal Code, detention should be used only in very serious cases. Offences under articles 295 and 377 of the Criminal Code do not fall into this category, and alternative sanctions should be applied. Later, the detention was prolonged several times. Judicial review of the lawfulness of the arrest and detention was carried out very informally and did not meet the requirements of the law on objective investigation of the personal data and other conditions of the accused person. According to article 144 of the Criminal Code, the court has a right to invite the person held in custody to participate in the complaint investigation. This was not done, although in every complaint - either by Mr. Marynich himself or by his lawyers - such a request was made.

24. On 30 December 2004, the Court of the Minsk region and the city of Zaslavl issued the following decision: the charge of possession of illegal firearms was dropped as being impossible to prove (article 295, accusation), but Mr. Marynich was sentenced to five years of imprisonment under article 210 of the Criminal Code.

25. It is mentioned in the Government's response that Mr. Marynich's guilt has been proved by witness statements, the results of expertise and some material evidence. The truth is that while charging Mr. Marynich with violation of article 210, part 4, of the Criminal Code, no expertise was carried out at all. All the witnesses denied that Mr. Marynich had misappropriated computers from the United States Embassy. The witnesses also stated that the offices had been emptied because of the end of the rental contract. Mr. Marynich was not present at that time. It is also stated that Mr. Marynich, using his son's vehicle, moved the computers to a garage. Materials of the trial show that the computers were moved from the apartment on Franzysk Skaryna Ave, 38-40, in the absence of Mr. Marynich, who was travelling from 25 January to 17 February 2003.

26. The Embassy of the United States of America in Minsk did not agree with the opinion of the court that computers had been stolen, which also supports Mr. Marynich's innocence. The Embassy sent a letter to the court describing the contractual relationship between it and the organization headed by Mr. Marynich. According to the agreement, the computers were given to the organization for its temporary use. Both sides were to act in accordance with the civil law norms of the Civil Code of the Republic of Belarus.

27. The source noted that Mr. Marynich's conviction for the offence under article 210 (4) of the Criminal Code is being appealed.

28. In summary, the source asserts that the criminal proceedings against Mr. Marynich were marked by motives and considerations alien to a fair criminal procedure. Therefore, his deprivation of liberty is arbitrary.

29. When assessing whether the proceedings against Mr. Marynich met the requirements of a fair trial, the Working Group emphasizes the following elements.

30. On the evidence of the information provided, it is established that the series of charges formulated against Mr. Marynich was triggered by the discovery of counterfeit foreign currency in his car. This was followed by a search of his cottage, which resulted in the seizure of weapons and ammunition, as well as various documents representing, according to the authorities, State secrets. From the first moment of his detention, Mr. Marynich contended that the weapons found never belonged to him, and that they must have been smuggled into his cottage maliciously by someone who had broken in when he was not there, in order to cause him harm. To support his innocence, he pointed out that there were obvious traces of a burglary, that various objects had been tampered with but nothing stolen, and no fingerprints of his were identified on the weapons.

31. The position of the Working Group is that the well-substantiated and plausible version of events given by Mr. Marynich should have been fully investigated by the authorities, irrespective of the dropping, at a later stage, of the charge of illegal possession of arms. In the particular circumstances of the case this would have been indispensable in order to avoid the appearance of his being a victim of charges fabricated by his political foes, bearing particularly in mind the eminent role Mr. Marynich had played earlier in the public life of his country. The fact that Mr. Marynich's version of events was disregarded by the authorities sheds a fairly unfavourable light on the adversarial nature of the criminal proceeding, which requires that the arguments of the defence shall be given the same attention as those of the prosecution.

32. The Working Group also found worrying that although the criminal investigation against Mr. Marynich began by the discovery of counterfeit foreign currency in his car, the Government remained silent on whether Mr. Marynich later became the object of an investigation with regard to the counterfeit money found in his possession. Nevertheless, on the basis of the information provided by the parties, the Working Group shall proceed on the assumption that no charge was brought against Mr. Marynich in this matter. Here again, the Working Group believes that in the fairly controversial context of this case the Government should have addressed this episode to avoid the appearance that the stopping of Mr. Marynich's car on suspicion of his having counterfeit money in his possession was merely a pretext for arresting him.

33. The complaint of the source that no satisfactory and substantive control by the judiciary over the detention of Mr. Marynich was carried out was not addressed on the merits by the Government. The Government limited itself to informing the Working Group that on 29 April 2004 the Prosecutor in Minsk chose detention in custody to be applied as a preventive measure (see paragraph 15 above). The Government did not contest or deny the allegations of the source that the power of the courts to adjudicate on requests by the detainee for judicial review of the Prosecutor's decision to prolong detention is limited to controlling the "formal correctness" of the decision (see paragraph 13 above).

34. This allegation of the source is corroborated by the Working Group's own findings reached during its visit in Belarus. The Working Group did indeed find that under the system in force in Belarus the decision to keep a person in detention or to extend the period of his or her detention is taken not by a judge, but by the public prosecutor, acting on proposals by the investigator, and in the absence of the person concerned or his or her lawyer. The Working Group stated that the prosecutor lacks the requisite impartiality to comply with the requirements of article 9 of the International Covenant on Civil and Political Rights, to which Belarus is a party, and added that although the new Criminal Procedure Code has introduced the possibility of challenging before a court the lawfulness of the prosecutor's decision to detain or to maintain an accused in detention, in practice, arrest and detention depend on the investigator. The court is only allowed to review certain procedural issues. The Working Group noted that this procedure often leads to the confirmation of the prosecutor's decision (see E/CN.4/2005/6/Add.3, paras. 39 and 40).

35. Concerning persons detained by the KGB in places of detention under their authority, as was Mr. Marynich, the Working Group observed that in practice no authority of all those involved in the criminal proceedings, whether the Ministry of the Interior, prosecutors or judges, exercises any effective control over the situation of persons held in detention centres of the KGB. The Working Group concluded that for those detainees, the risk of abuse is high and remedies are only hypothetical (*ibid.*, paras. 56 and 57).

36. The Working Group recalls that in the course of its visit to Belarus it insisted on meeting Mr. Marynich, but the authorities refused the request on the pretext that Mr. Marynich was suspected of extremely serious offences involving State security and State secrets. The Working Group told the authorities that it considered a refusal to allow it to visit a detainee under such pretexts unacceptable. It now appears that those grounds were in fact baseless, as Mr. Marynich was convicted of embezzling goods intended for his association.

37. The only offence for which Mr. Marynich was found guilty was the unlawful appropriation of several computers. The source contended that the computers were lent by the Embassy of the United States of America for temporary use by the organization headed by Mr. Marynich. The source alleges that the Embassy confirmed this in a letter addressed to the trial court. The Government failed to provide an explanation of how someone could be found guilty for the embezzlement of objects which the owner himself gave Mr. Marynich for temporary use. The lack of any explanation of this important point again sheds an unfavourable light on the objectivity, hence the fairness of the criminal procedure.

38. The Working Group, when it examines a communication, never acts as a substitute for a national court, and does not review either the facts established by a court or the application of the domestic laws; it seeks to determine that the principle that everyone shall be tried by an independent and impartial tribunal has been respected.

39. In this regard, the Working Group cannot but rely on the conclusions reached by the former Special Rapporteur on the independence of judges and lawyers following his visit in Belarus, referred to above. The Working Group also refers to its own report adopted after its visit in Belarus, in which it noted with concern that “the procedures relating to tenure, disciplinary matters and dismissal of judges at all levels do not comply with the principle of independence and impartiality of the judiciary” (ibid., para. 44).

40. The elements of the criminal procedure set out above, taken as a whole, and bearing in mind their cumulative detrimental effects on the position of Mr. Marynich as a person charged, led the Working Group to conclude that the failure to observe the international norms relating to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character.

41. In the light of the foregoing, the Working Group renders the following opinion:

The detention of Mikhail Marynich is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, to which Belarus is a party, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

42. Consequent upon this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation of Mikhail Marynich in order to bring it into conformity with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights by releasing Mr. Marynich from detention.

Adopted on 2 September 2005
