

OPINION No. 14/2008 (Uzbekistan)

Communication addressed to the Government on 26 July 2007.

Concerning Mr. Erkin Musaev.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)
2. The Working Group conveys its appreciation to the Government for having forwarded the requested information in good time.
3. (Same text as paragraph 3 of Opinion No. 15/2007.)
4. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comment. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.
5. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Erkin Musaev, an Uzbek national, born 9 May 1967, titular of passport No. CA 1848854 issued by the Ministry of the Interior, usually residing at Lashkarlar 8A apt # 22 in Tashkent, was arrested on 31 January 2006 at Tashkent airport at around 4.50 p.m. by officers of the customs office and of the National Security Service (NSS). Mr. Musaev was heading for Bishkek to attend a regional seminar for the Border Management for Central Asia Programme

(BOMCA). He was the country manager for BOMCA, a joint programme of the United Nations Development Programme (UNDP) and of the European Union. At the time of the arrest Mr. Musaev was the holder of a UNDP 'Special Service Agreement' contract, which was terminated by the UNDP as of 1 April 2006. The authorities did not produce a warrant at the time of his arrest.

6. Upon arrival at the airport Mr. Musaev was approached by two customs officers, who checked his luggage and documents. Thereafter, a third customs officer appeared claiming that sniffer dogs had detected smells of narcotics in his luggage. At the luggage department Mr. Musaev was approached by two other customs officer and three civilians. One officer searched Mr. Musaev's suitcase, but did not find anything suspicious. This officer then retrieved a computer disc allegedly containing secret information from the side pocket of his suitcase, which had been unattended for a while. Mr. Musaev denies ownership of this disc and knowledge about its content. Mr. Musaev was requested to document the incident at a separate room, where two plain clothes officers from the NSS were waiting. He was briefly detained at Tashkent airport before being transferred on the same day by these officers to the detention facilities of the NSS in Tashkent. While in detention the authorities produced a search warrant for his residence signed by the NSS investigator. The warrant read that a search would be conducted in relation to secret materials, narcotics, weapons, and religious material.

7. Following his arrest on 31 January 2006, Mr. Erkin Musaev's family was not informed by the Uzbek authorities about his whereabouts for more than 10 days. Mr. Musaev was not allowed to see a lawyer of his choice during this period, either. During more than four months of detention at a detention facility of the National Security Service (NSS) he was not allowed to see his family.

8. During this period he was subjected to various forms of pressure, including threats by the interrogators who tried to force him to sign a confession. He was also subjected to beatings by fellow inmates at the instigation of the interrogators. Furthermore, he was beaten on his chest three nights in a row, which inflicted pain on his inner organs. Drugs were forcibly administered on him. Mr. Musaev was further tied up with his hands to a bed and hit on his heels, where after he was unable to walk for several days. He was also subjected to a method called "Northern Aurora", which means hitting somebody hard on his head for a prolonged period. The beatings and other ill-treatment resulted in a broken jaw. First aid was provided by other inmates.

9. Because of the ill-treatment Mr. Musaev signed a confession document regarding the accusations made against him in his first trial on charges pursuant to articles 157, 162, 301 and 302 of the Uzbek Penal Code. Despite the repeated ill-treatment he, however, refused to sign a confession statement regarding those charges brought against him, which related to the second and third trial. Furthermore, Mr. Musaev was given accusative conclusion No. 20/79-2006, approved by Vice-General Prosecutor B. Nurmuhamedov, only one day before the commencement of the first trial on 30 May 2006, whereas article 434 of the Penal Code of Uzbekistan requires the observance of a period of at least three days.

10. Mr. Musaev was sentenced by the Uzbek Military Court of Tashkent to 15 years of imprisonment pursuant to article 157 of the Criminal Code on charges of high treason, article 162 for disclosure of state secrets, article 301 for abuse of

office and article 302 for negligence. Mr. Musaev's verdict reads, *inter alia*, that the information he provided was being utilized by unfriendly forces in order to organize disturbances in the city of Andijan in May 2005. No family members or independent observers were permitted to be present at the trial. Mr. Musaev's first lawyer was a former NSS official and, although paid by his family, did not act in Mr. Musaev's defence.

11. Despite the fact that the United States embassy in Uzbekistan later confirmed, by a letter dated 20 February 2007, that a United States Air Force Attaché had arrived in Tashkent for the first time on 6 June 2004, had been accredited on 1 November 2004, and had departed Uzbekistan on 19 July 2006, the trial court held that Mr. Musaev had met him in the beginning of the year 2004. The court largely relied on these allegations and based the first verdict against Mr. Musaev mainly on them.

12. The source alleges that Mr. Musaev was not provided with a lawyer at the beginning. His testimonies were forged. The initial testimonies were contained on three pages all carrying his signature. During the criminal investigation it appeared, however, that the first two pages were taken off and another page not carrying his signature was attached instead. Therefore, the case had to be returned to the prosecution for additional investigation. Mr. Musaev was not furnished with the investigation file, which infringes article 46 of the Criminal Procedure Code.

13. After his second trial before the Tashkent City Court, Mr. Musaev, on 14 July 2006, was found guilty of fraud to the detriment of United Nations funds and sentenced to six years of imprisonment pursuant to article 168 of the Criminal Code, in spite of the absence of a confession and an internal investigation conducted by UNDP office in Tashkent, which "found no basis for the accusations" against Mr. Musaev, according to a UNDP document dated 4 July 2006. The sentences under the first and the second convictions were partially combined to a total of 16 years of imprisonment. The trial was open to the public and his relatives were able to attend the proceedings.

14. During his second trial, no evidence was produced against Mr. Musaev. Four witnesses did not testify against him. Two other witnesses' testimonies were not considered by the court. As a manager of the programme in question, Mr. Musaev was not involved in financial matters at all, hence, he could not have embezzled any funds. The source alleges that the trial court violated the right to be presumed innocent.

15. Thereafter, third parties compensated for the alleged damages. Although, this means under Uzbek law, according to a resolution of the plenary of the Supreme Court from 2004, that the prison sentence cannot be implemented irrespective of whether the convict or a third party pays, Mr. Musaev's sentence was nonetheless enforced.

16. After the conclusion of the first two trials Mr. Musaev was transferred to the detention facility of Colony 64/21 in Bekabad city, which is run by the Ministry of the Interior. The source alleges that Mr. Musaev was not allowed to meet with his lawyer, so that he was unable to file his first petition of appeal against his first conviction within the prescribed time limits. Two of his letters, No. M-191 of 19 July 2006 and No. M-204 from 27 July 2006, requesting to see his lawyer to file the first appeal remained without a response from the authorities.

17. On 7 March 2007 he was transferred from Colony 64/21 to the NSS premises in Tashkent for further interrogation. There were no facilities at the NSS premises to work on the appeal and he was not given an opportunity to consult his criminal file and appeal related documents that remained at Bekabad prison. The deadline for filing an appeal established by Uzbek criminal procedure law had already expired.

18. On 21 October 2007 Mr. Musaev was able to file a second appeal petition for cassation. In his written petition he indicated that during the investigation physical and mental measures were used against him and that he was forced to testify against himself. The cassation appeal was considered by the Military Court on 10 November 2007 within the hour of receipt and dismissed without entertaining the allegations of ill-treatment and forced confessions. Neither Mr. Musaev nor his lawyer has been furnished with a written judgement by the Court alleging that it is confidential. The source alleges that this is in violation of applicable Uzbek law.

19. Regarding the third trial on charges of treason pursuant to article 157 of the Penal Code, which commenced on 11 September 2007, the source informs that Mr. Musaev was transferred to a NSS detention facility in February 2007 as a witness in the case of two customs officers. Officials of the NSS were pressing him to provide false evidence against these customs officers. When Mr. Musaev refused to comply with this request, NSS officials put pressure on Mr. Musaev's father, Mr. Aidjan Musaev, to exercise influence over his son. Reportedly, the family hired another lawyer for Mr. Musaev who had access to him, but was dealing only with the third set of charges put against Mr. Musaev. On 7 March 2007, at about 7 p.m., Mr. Musaev suffered from a traumatic brain injury following interrogation at the NSS facility and had to undergo surgery at the GlavTashkentStroy hospital. The two customs officers were then forced to provide false testimonies against Mr. Musaev.

20. The charges against Mr. Musaev were based on allegations of having been recruited by a United States citizen as an agent for foreign powers, of having recruited the two customs officers as spies, and of having used the premises of UNDP office in Tashkent for conspiratorial meetings. However, according to a confirmation letter from UNDP, none of the three persons entered UNDP premises during the relevant period of time corresponding to the charges brought against Mr. Musaev.

21. According to the source, despite his eligibility for release as a candidate falling within group 2 of two amnesty resolutions by the Uzbek Senate from 2005 and 2006, Mr. Musaev remains in detention.

22. The Government states, in its first response of 11 September 2007, that the Uzbek citizen Erkin Aidzhanovich Musaev was detained at Tashkent airport on 31 January 2006, while attempting to fly to Bishkek, when officials of the State Customs Committee discovered in his luggage a diskette containing secret information. This was officially recorded by the customs representatives, where after Mr. Musaev and the material evidence were handed over for investigation to the National Security Service, which initiated criminal proceedings against him under article 162 (Divulgence of State secrets) of the Criminal Code.

23. In accordance with the provisions of articles 242, 243 and 245 of the Code of Criminal Procedure and with the approval of the Military Prosecutor, it was decided to apply in respect of Mr. Musaev the preventive measure of remand in custody. In

addition, Mr. Musaev was acquainted with all the procedural documents against signature.

24. The Government further states that during the investigation, Mr. Musaev confirmed that the diskette discovered in his luggage belonged to him and that it contained secret information. He stated that he had obtained the diskette during his service with the Ministry of Defence, where he had occupied the post of Chief of the Department for International Military Cooperation. According to his testimony, he showed the information on the diskette to the air force attaché of a foreign embassy, who paid Mr. Musaev sums totalling approximately US\$ 15,000 in exchange for secret information concerning the defence capability of Uzbekistan. Mr. Musaev subsequently confirmed this testimony at trial.

25. On 31 May 2006, the Tashkent Military Court began to hear the criminal case against Mr. Musaev, who was charged under articles 157 (Treason), 162 (Divulgence of State secrets), 301 (Forgery by an official) and 302 (Dereliction of duty) of the Criminal Code. In court, Mr. Musaev frankly confessed to committing these offences, stating that he was recruited by a foreign diplomat, on whose instructions he gathered information on military issues, including secret information, for money. The trial took place in camera, since the materials in the criminal case contained secret information. By judgement of the court, Mr. Musaev was sentenced to 15 years' deprivation of liberty, to be served in ordinary-regime colony No. 64/21 in Bekabada.

26. It must be noted that the court judgement against Mr. Musaev made no mention of accusations that he had supplied information used in organizing terrorist acts in Andijan in May 2005.

27. On 20 July 2006, another hearing took place, against Mr. Musaev and two representatives of the American firm FDN LLC Holding, Mr. B. Inoyatov and Mr. A. Kuldashv, at the Tashkent City Court. By judgement of the court, they were found guilty of committing offences under articles 168 (Obtaining property by deception), 189 (Violating the regulations on trade and provision of services), 190 (Performing an activity without a licence) and 228 (Forgery of documents, stamps, seals and forms, etc.) of the Criminal Code.

28. The Government stated that, in March 2007, new instances of illegal activity by Mr. Musaev, linked to his collaboration with representatives of foreign special services, came to light. He was therefore taken under guard to the National Security Service remand prison, in conformity with articles 244 and 538 of the Code of Criminal Procedure, and on 15 June 2007, he was again charged under article 57 (Treason) of the Criminal Code. All investigative actions in respect of Mr. Musaev were being conducted in strict compliance with legislative requirements. Moreover, under article 497 of the Code of Criminal Procedure, he could have lodged an appeal or a protest against court judgements that had not yet entered into force. However, at the time Mr. Musaev was taken to the National Security Service remand prison, the court judgements against him had already entered into force. Under article 498 of the Code of Criminal Procedure, judgements that have entered into force may be appealed by way of cassation. There is no deadline for the lodging of a cassational appeal.

29. While in the National Security Service remand prison, Mr. Musaev made no request to be provided with any documents or materials pertaining to the criminal

case in order to familiarize himself with them. No mental, still less any physical, pressure was brought to bear on Mr. Musaev or his close relatives.

30. Article 9, paragraph 3, of the International Covenant on Civil and Political Rights, stipulates that anyone detained must be brought promptly before a judge or other officer obliged by law to exercise judicial power and is entitled to trial within a reasonable time or to release. Under Uzbek legislation, this power is assigned to the prosecutor. The right of Uzbek citizens to appeal against actions of officials is set out in article 35 of the Constitution and article 241 of the Code of Criminal Procedure, under which Mr. Musaev was entitled to appeal to a higher body, including a judicial body, the decision to apply to him the preventive measure of remand in custody. However, he lodged no appeal.

31. In conformity with article 242 of the Code of Criminal Procedure, remand in custody is applied as a preventive measure in cases of premeditated offences the penalty for which, under the Criminal Code, is more than three years of deprivation of liberty. The acts committed by Mr. Musaev involved offences under article 157 (Treason) of the Criminal Code, which are categorized as especially serious and are punishable by deprivation of liberty for up to 20 years.

32. During the pretrial investigation and in court, Mr. Musaev fully admitted his guilt of the offences imputed to him and lodged no complaint about the illegality of his detention.

33. In reply to the transmission of additional information that had been received from the source as summarized above, the Government, on 25 April 2008, sent to the Working Group a further communication, which has not been transmitted to the source since the content of the mentioned communication does not provide any new information.

34. In the light of the foregoing, the Working Group notes that in the response of the Government, which refers to the three different trials against Mr. Erkin Musaev, there is no specific mention made of the allegations of irregularities, which occurred during the trials according to the source. The Government, in its response dated 11 September 2007, satisfies itself with the remark that the conviction of Mr. Musaev following his first trial, when he was charged under articles 157 (treason), 162 (divulgence of State secrets), 301 (forgery by an official) and 302 (dereliction of duty) of the Uzbek Criminal Code, was based on the confession of Mr. Musaev to committing these offences. The Government adds that the trial took place in camera.

35. Regarding the other two trials, the Government only explains that the first of them was conducted on 20 July 2006 against Mr. Musaev and his two co-defendants, both representatives of the United States company FDN LLC Holding. By judgement of the court they were found guilty of having committed offences under articles 168 (obtaining property by deception), 189 (violating the regulations on trade and provision of services), 190 (performing an activity without a licence) and 228 (forgery of documents, stamps, seals and forms...) of the Uzbek Criminal Code. The Government further stated that the third trial in March 2007 incriminated Mr. Musaev of collaboration with representatives of foreign special services.

36. Therefore, the Government not only fails to deal with the allegations of irregularities of the trials according to the source (such as denial of access to and absence of a lawyer, the absence of compelling evidence and insufficient time for the preparation of a proper defence because of belated receipt of the indictment by the prosecution), but also fails to substantively address the specified claim of the source that Mr. Musaev was subject to torture in order to obtain a confession. This is of particular relevance given that the trial court essentially relies on Mr. Musaev's confession as a decisive element upon which the first verdict against him is based.

37. The Working Group has no reason to question the credibility of these allegations of the source, also in the light of the failure of the Government to substantially address further assertions, described in some detail as to the means applied and the point of time, that Mr. Musaev was ill-treated around 7 March 2007 in the NSS detention facility when forced to provide false testimony as a witness against two customs officers.

38. The reporting of the Government of the Republic of Uzbekistan to the Committee against Torture as well as the conclusions and recommendations, adopted by the Committee at its thirty-ninth session in November 2007,²⁹ have been brought to the attention of the Working Group. The Committee reveals that State representatives frankly acknowledged that confessions under torture have been used as a form of evidence in some proceedings, notwithstanding the actions of the Uzbek Supreme Court to prohibit the admissibility of such evidence. The Committee against Torture recommends that the State party should review cases of convictions based solely on confessions, recognizing that many of these may have been based upon evidence obtained through torture or ill-treatment, and, as appropriate, provide prompt and impartial investigations and take appropriate remedial measures.³⁰

39. The Working Group has stated in previous Opinions that the use of torture to obtain a confession and admit such evidence in criminal proceedings amounts to a serious violation of the right to fair trial as it infringes the right not to be compelled to testify against oneself or to confess guilt (article 14, paragraph 3 (g) of the International Covenant on Civil and Political Rights). Subsequent convictions can never be considered as having been handed down following due process rules. For this reason, and taking into account the lack of a response from the Government on the repeated and detailed allegations of torture reportedly suffered by Mr. Musaev, the Working Group considers that Mr. Musaev's confession, which has informed the verdicts, cannot be admitted as valid evidence. There is a manifest suspicion that Mr. Musaev's confession was obtained under torture, and there is no further evidence provided on the facts of the charges against him, which could be considered as objective.

40. Furthermore, and according to the source, Mr. Musaev (a) had no possibility to communicate with a lawyer for more than 10 days following his arrest; (b) was not allowed to meet with his family for four months while in detention; (c) became aware of the accusations only one day before the first trial, which took place in camera as acknowledged by the Government; (d) suffered from objective limitations in the development of the evidence in respect of witnesses proposed by his defence;

²⁹ CAT/C/UZB/CO/3.

³⁰ Ibid. para. 20.

and (e) was factually constrained from preparing and filing an appeal against the first verdict within the applicable deadlines, since he could not meet with his lawyer for lack of response by the authorities to his according request letters from 19 and 27 July 2006. Instead, he had to resort to an appeal of cassation.

41. These facts amount to serious irregularities of the trials and violate Mr. Musaev's rights as protected by article 14 of the International Covenant on Civil and Political Rights, more particularly the rights to a fair and public hearing by a competent, independent and impartial tribunal established by law; to be informed promptly and in detail of the nature and the cause of the charge against him; to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; and 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 the witnesses against him. Consequently, Mr. Musaev's detention is arbitrary in terms of category III.

42. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Erkin Musaev 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, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

43. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Erkin Musaev and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 9 May 2008.