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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14–23 November 2012

No. 45/2012 (India)

Communication addressed to the Government on 12 September 2012

Concerning Umar Farooq Shaikh

The Government did not reply to the communication.

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

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed that mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

- (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);
- (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
- (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Mr. Umar Farooq Shaikh is a 15-year-old student residing in Jammu and Kashmir, India.

4. On 3 February 2012, he was taken to the Zukura police station. He was then transferred to Sheegari police station, Srinagar, Jammu and Kashmir. He was allegedly charged with having committed several offences during violent protests over the last two years. The charges against Mr. Shaikh included rioting, rioting armed with deadly weapons, assault or use of criminal force to deter a public servant from discharge of his duty and public singing of obscene songs.

5. On 27 February 2012, a local court ordered his release. However, this decision has reportedly not been executed. Instead, on 29 March 2012, the detention was extended under the Public Safety Act (PSA). The PSA detention order accuses Mr. Shaikh of involvement in “anti-social activity aimed at disturbing public peace and tranquillity” and “acts aimed at keeping the State on boil and thereby bringing about secession of Jammu and Kashmir from India”. The detention order does not explain the specific offences Mr. Shaikh is suspected of having committed. It refers to the charges brought against him in February 2012 but fails to also mention the Court’s order to release him on bail. A petition filed by his family challenging the order extending his detention is reportedly pending before a local court.

6. Following the order of 29 March 2012, Mr. Shaikh was transferred to Udhampur district jail in Jammu, approximately 200 km away from his place of residence, where he allegedly remains.

7. The source submits that the ongoing detention runs counter to the amendments to the PSA in force since 18 April 2012, by virtue of which the detention of anyone under 18 years old is prohibited. His detention is in alleged breach of article 9 of the International Covenant on Civil and Political Rights (ICCPR), article 9 of the Universal Declaration of Human Rights (UDHR) and article 37 (b) of the Convention on the Rights of the Child (CRC). According to the latter provision “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

8. Furthermore, article 37 (d) of the CRC also provides that “[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”. In its general comment No. 10 (2007) on children’s rights in juvenile justice, the Committee on the Rights of the Child clarified that “[e]very child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of (the continuation of) this deprivation of liberty within 24 hours” (CRC/C/GC/10 of 25 April 2007, para. 83). The Committee also recommended

that States parties “ensure by strict legal provisions that the legality of a pretrial detention is reviewed regularly, preferably every two weeks” (ibid.).

9. The source reiterates that this case is part of a broader pattern of cases of detention without trial under the provisions of the Public Safety Act (PSA) in Jammu and Kashmir, India.

Response from the Government

10. The Working Group regrets that the Government has not responded to the allegations transmitted to it on 12 September 2012.

11. Despite the absence of any information from the Government, the Working Group considers it is in a position to render its opinion on the detention of Mr. Shaikh in conformity with paragraph 16 of its methods of work.

Discussion

12. Mr. Shaikh, a 15-year-old student, has been subjected to administrative detention for more than nine months (since 3 February 2012) under the PSA, despite a judicial order for his release.

13. With regard to the PSA, the Working Group notes that the Special Rapporteur on the situation of human rights defenders in her 2012 annual report recommended the repeal of this law because of the broad and vague definitions contained in it. The Special Rapporteur also expressed her deep concern about the arbitrary application of security laws, including the PSA.

14. Mr. Shaikh, in fact, was deprived of his liberty even in flagrant violation of the PSA, as the Act prohibits detention of persons under 18 years old.

15. The Working Group recalls that the provisions of article 14 of the ICCPR on the right to a fair trial are applicable where sanctions are regarded as penal because of their purpose, character or severity. This includes a detention that is criminal in nature but is qualified as administrative detention under domestic law.¹ The Group notes that, under the PSA, the detention period can be extended for up to two years.

16. Given the nature of the sanctions provided for in the PSA, the Working Group considers that the provisions of article 14 of the ICCPR on the right to a fair trial are applicable in Mr. Shaikh’s case even though under domestic law his detention is qualified as administrative.

17. The right to a fair trial, provided for in article 14 of the ICCPR, includes the right to be informed promptly and in detail of the nature and cause of the charges brought against the person. In the case under consideration, in violation of article 14 of the ICCPR, Mr. Shaikh was not informed of any specific offence for which he was arrested.

18. The Working Group recalls that, pursuant to article 37 of the CRC, no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

19. Mr. Shaikh has been detained in Udhampur district jail in Jammu, approximately 200 km away from his place of residence. Detention at such a distance from his home town

¹ See Human Rights Committee, *Paul Perterer v. Austria*, communication No. 1015/2001, para. 9.2; and general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 15.

prevents him from exercising his right to maintain contact with his family through visits as provided for in article 37 of the CRC.

20. The Working Group considers that Mr. Shaikh was denied the fundamental rights contained in articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR. His case, therefore, falls into categories I (for the continued detention imposed after a local court ordered the release of Mr. Shaikh) and III of the categories applied by the Working Group.

Disposition

21. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Shaikh 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; it falls into categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

22. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Shaikh and bring it into conformity with the standards and principles set forth in the UDHR and the ICCPR.

23. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Shaikh and accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the ICCPR.

[Adopted on 15 November 2012]