

No. 5/2013 (Turkmenistan)

Communication addressed to the Government on 5 November 2012

Concerning Maksat Kakabaev and Murad Ovezov

The Government replied to the communication on 14 January 2013. 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 the 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, as 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. Maksat Kakabaev (hereinafter Mr. Kakabaev) and Murad Ovezov (hereinafter Mr. Ovezov), both nationals of Turkmenistan, are popular singers.

4. In January 2011, Mr. Kakabaev appeared on TMB, a Turkish satellite music channel. He was interviewed and his music videos were played. Following his appearance on TMB, the Turkmen Ministry of Culture and Broadcasting summoned Messrs. Kakabaev and Ovezov, along with six other popular singers who had appeared with him in music videos, to a branch office of Turkmenistan's Ministry of Interior. They were instructed not to appear on foreign media again. All the singers were interrogated and allegedly forced to submit explanatory statements.

5. On 28 January 2011, after 15 days in administrative detention during which they were verbally insulted and physically abused, Messrs. Kakabaev and Ovezov were charged and sentenced to seven and five years' imprisonment, respectively.

6. Mr. Kakabaev faced charges relating to a year-old dispute over a television antenna with his neighbour. He was reportedly placed in detention at the Shagal strict regime prison.

7. Mr. Ovezov was charged in relation to a car accident that took place in 2010 and for which he was sentenced at the time to a two-year conditional term. Allegedly, Mr. Ovezov was re-arrested in 2011 and sentenced to five years in prison for failing to register at the police station as part of his conditional sentence. Mr. Ovezov was allegedly placed in a colony in Khanhowuz district of eastern Mary province..

8. The petitioners' trials was reportedly held behind closed doors in February 2011 and relatives were denied access to the courtroom.

9. The source claims that due to the authorities' control over information relating to the human rights situation in the country, few specific details are known about the arrest and incommunicado detention of Messrs. Kakabaev and Ovezov. Family members and friends are reportedly too fearful of reprisals to provide any information to organizations outside Turkmenistan.

10. In March 2012, the Human Rights Committee in its concluding observations on Turkmenistan (CCPR/C/TKM/CO/1) noted that, despite an improved legislative framework, issues remained in its practical implementation, especially relating to the prohibition of torture, independence of judiciary, freedom of assembly and freedom of association.

11. In this context, the source submits that the detention of Messrs. Kakabaev and Ovezov follows directly from their peaceful exercise of the right to freedom of opinion and expression, in the form of songs, as guaranteed under article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Article 19, paragraph 2, of the International Covenant on Civil and Political Rights protects "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". As the Human Rights Committee noted in its general comment No. 34 (2011) on article 19: freedoms of opinion and expression, freedom of expression is "the vehicle for the exchange and development of opinions", being an indispensable element of any democratic society (para. 2). The source points out that freedom of expression is also guaranteed by article 28 of the Constitution of Turkmenistan.

12. The source argues that none of the restrictions provided for in article 19, paragraph 3, of the International Covenant on Civil and Political Rights are applicable to the case in hand. According to the source, given that the freedoms of opinion and expression protect all forms of opinion and expression, a singer has a right to choose the music, style and content of his or her songs, without interference. Both petitioners are well-known popular singers. Mr. Kakabaev is particularly renowned for his rap songs. For example, the lyrics of one of his songs are as follows: "Open your eyes, look in the mirror/ Look at your surroundings/ Do not stop, wake up/ Enough is enough". "Do not lose the opportunity/ Never lose yourself/ Believe in yourself/ Otherwise, it might be too late/ Wake up, wake up!"

13. The source alleges that the Turkmen authorities persecuted both singers because their songs and clothing were considered contrary to the Turkmen mentality and government policies which aim to promote patriotism among Turkmen youth.

14. The Turkmen Law on Culture states that the status of singers, as part of a larger group of "creative workers", is defined by their mission, which consists of creating cultural values that reflect national particularities of the Turkmen mentality (arts. 23 and 24). It further states that the mission of singers shall include encouraging the formation of moral and spiritual qualities. It is alleged that the Turkmen authorities considered that Mr. Kakabaev's songs and clothing did not "reflect the national particularities of Turkmen mentality" nor did they "encourage the formation of moral and spiritual qualities" among the Turkmen people. According to the report by the Turkmen Initiative for Human Rights, Messrs. Kakabaev and Ovezov were described as "young music artists, who perform pop love songs rather than patriotic music of the kind favoured by the Government".

15. The source argues that the speediness and secrecy surrounding their trial demonstrate the political motive behind their arrests and subsequent convictions. The source claims that, despite the fact that Mr. Kakabaev's dispute with his neighbour was peacefully resolved, he was sentenced to seven years' imprisonment. If Mr. Kakabaev's charge was in relation to this dispute, the source considers that a seven-year prison term is unjust and disproportionate.

16. Similarly, the source contends that Mr. Ovezov's charges and prison term raise suspicions about the legitimacy of the case. Mr. Ovezov was sentenced on charges related to a car accident that occurred in 2010 for which he was given a two-year conditional term at the time. However, immediately after his interview with TMB, Mr. Ovezov was re-arrested; allegedly because he had failed to register at the police station as part of his conditional release.

17. The source further claims that the political nature of the case can also be seen in the fact that although Mr. Kakabaev is one of the most watched Turkmen singers on YouTube, his videos were never shown on Turkmen Owazy, the main music video channel in the country. In the source's view, this demonstrates the general policies in Turkmenistan which are directed at suppressing any form of expression that is not deemed to be patriotic or reflecting national Turkmen values. The source contends that Messrs. Kakabaev and Ovezov, through their songs, did not pose any real or abstract threat to national security, public order, health or public morals.

18. In addition, the source argues that the detention of Messrs. Kakabaev and Ovezov constitutes an arbitrary deprivation of liberty as the authorities failed to observe the minimum international standards of due process and fair trial.

19. Firstly, the source notes that the petitioners have been denied a public hearing. Article 14, paragraph 1, of the International Covenant on Civil and Political Rights states that "in the determination of any criminal charge against him [...], "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal". Article 10 of the Universal Declaration of Human Rights states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal". Moreover, article 27 of the Turkmen Criminal Procedure Code stipulates that "criminal hearings shall be open in all courts". The right to a public hearing is a necessary component of a fair trial.¹ The Human Rights Committee considers that "the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large". It further considers that courts must "provide for adequate facilities for the attendance of interested members of the public".

20. The source contends that in the present case, the Government of Turkmenistan denied Messrs. Kakabaev and Ovezov their right to a public hearing. The trial was closed and their relatives were denied access to the courtroom. There is no reliable information on the exact charges for which Messrs. Kakabaev and Ovezov were sentenced to seven and five years' imprisonment, respectively.

21. Secondly, the source emphasizes that pursuant to article 14 of the International Covenant on Civil and Political Rights and article 10 of the Universal Declaration of Human Rights, there can be no fair trial without a competent, independent and impartial court. One of the requirements of impartiality contained in article 14, paragraph 1, of the International Covenant on Civil and Political Rights is that of reasonableness. The court must appear to a reasonable observer to be impartial.² The requirement of independence refers, inter alia, to the "independence of the judiciary from political interference by the executive branch and legislature."³

22. In this case, the source contends that a reasonable observer would qualify the grounds on which the court convicted both singers as an indication of bias. Mr. Kakabaev was reportedly convicted because of an alleged dispute with his neighbour over a television antenna. The lawfulness of the charge is suspicious because the alleged dispute took place one year prior to Mr. Kakabaev's arrest, and had been peacefully resolved by then. Nonetheless, Mr. Kakabaev was sentenced to seven years in prison. Similarly, Mr. Ovezov was reportedly sentenced to five years in prison on charges related to a car accident for which he had received a two-year conditional term. He was re-arrested because he allegedly did not register at the police station as part of his conditional sentencing.

23. The source submits that these charges were used as a pretext by the authorities to detain and convict the singers. The source expresses concern that Messrs. Kakabaev and Ovezov were detained and convicted on fabricated charges by a court that lacked independence and impartiality.

24. Thirdly, the source maintains that the petitioners were denied effective legal representation in violation of article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. No information is available as to whether at any stage of the proceedings, the Turkmen authorities allowed Messrs. Kakabaev and Ovezov access to legal representation or assistance. However, the source submits that the expediency of their trial demonstrates that they did not have effective legal representation. Both singers were initially summoned on 28 January 2011. They were held for 15 days in administrative detention, and in less than a month, they were sentenced to seven and five years' imprisonment, respectively.

Response from the Government

25. In its response dated 14 January 2013, the Government provided the Working Group with the following information:

26. The Government contends that Messrs. Kakabaev and Ovezov were convicted for crimes not related to their creative work.

27. On 3 February 2011, the prosecutor's office of Kopetdag district, City of Ashgabat, initiated criminal proceedings against Mr. Kakabaev under article 279 of the Criminal Code of Turkmenistan; the case was referred to the Investigation Department of the Kopetdag district police department for a preliminary investigation. On 10 February 2011, Mr. Kakabaev faced a new charge under articles 279 and 228 of the Criminal Code.

28. According to the preliminary investigation, Mr. Kakabaev, citizen of Turkmenistan, born in XXXX, in conspiracy with his father, Ovezmuhammed Kakabaev, and his brother, Murat Kakabaev, at about 1.30 p.m. on 2 June 2010, carried out unlawful actions in severe violation of public order, coupled with the use of violence and the destruction and damage of private property in a public place without any reason. In particular, in the hallway of Building N-222 of the residential complex Gaudan "B" in Ashgabat, they used physical violence against an underage person, V. Staklon, and on N. Ataev, who reside in the same building. Mr. Kakabaev and his accomplices continued their violence despite the lawful requests of Mr. Orazov, a student at the Institute of the Ministry of Internal Affairs, who was in charge of protecting the public order at that time and who demanded that they maintain the public order. The minor, V. Staklon, and Mr. Ataev were dragged from the hallway out into the street. The minor V. Staklon was beaten up and suffered from "bruising of the lower jaw and neck, hematoma of the soft tissues", and his shirt was torn. Mr. Ataev was also beaten up and suffered a "fracture of nasal bones, bruising of the chest, waist, limbs and abrasions", and his shirt was torn.

29. The Government informs the Working Group that, in addition to that, in August 2010, Mr. Kakabaev asked Mr. Garlyev to lend him one thousand, two hundred U.S. dollars (\$1200) to pay the Iranian company, Reshtap Gurgun Transport, to cover travel expenses for shipment Mr. Kakabaev's cars, a Mercedes Benz and a Toyota Avalon from the United Arab Emirates to Turkmenistan. In fact, Mr. Kakabaev committed an act of fraud and abused Mr. Garlyev's trust because he deceived him and did not pay back his debt, thereby causing Mr. Garlyev serious material damage.

30. On 16 February 2011, the Kopetdag District Court found Mr. Kakabaev guilty of charges under articles 279 and 228 of the Criminal Code, and sentenced him to five years' imprisonment.

31. While serving his sentence, Mr. Kakabaev was granted certain rewards and reprimands; 13 long and 10 short visits with close relatives; and he also received nine food parcels. He sought medical assistance nine times and at the present time, his health condition is acknowledged as satisfactory.

32. On 12 October 2010, the investigation department of the Ashgabat police initiated criminal proceedings against Mr. Ovezov under article 326 of the Criminal Code of Turkmenistan. During the investigation, it was established that on 30 April 2010, at about 12.45 a.m., Mr. Ovezov grossly violated traffic rules. He was driving a BMW 525, registered in the name of Mr. Charyev, without a driving licence or power of attorney, west to east along Shevchenko Street. He made a U-turn, crossed a double solid line in the centre of the road and ran into a Toyota Previa driven by Mr. Elyasov. As a result of the collision, Mr. Kakabaev, the passenger of the Toyota Previa, suffered moderately severe injuries, which has led to prolonged health problems such as "shift of the right hip joint, closed fractures of the right forearm joint without shift from regular position, bruising on his nose, a concussion, bruises on the right pelvic side and forehead scratches."

33. On 10 November 2010, Mr. Ovezov was charged under article 326 of the Criminal Code and travel restrictions were imposed as a measure of restraint. On 20 November 2010, on the conclusion of the preliminary investigation, the criminal case was transferred to Court.

34. On 14 December 2010, the Azatlyk District Court found Mr. Ovezov guilty under articles 326 and 68 of the Criminal Code and sentenced him to two years of correctional work. On 29 January 2011, according to the decision of the District Court, Mr. Ovezov's sentence was changed to two years in a prison colony settlement.

35. While serving the sentence, Mr. Ovezov was not granted any rewards or reprimands; he was granted six long and 18 short visits with close relatives; and allowed to receive an unlimited amount of parcels. He did not seek any medical assistance and his current health condition is satisfactory.

Further comments from the source

36. The source informed the Working Group of the release of Messrs. Kakabaev and Ovezov under a presidential amnesty celebrating National Flag Day. According to the source, their release came following its communication to the Working Group and a letter from a group of Members of the European Parliament.

37. As to the Government's response, the source contends that the response does not address the circumstances surrounding the arrest of Messrs. Kakabaev and Ovezov or the procedural violations outlined in the communication. The facts surrounding the arrest of Messrs. Kakabaev and Ovezov strongly suggest that their detention resulted from their musical performances.

38. The source recalls that the singers appeared on the Turkish satellite music channel TMB in January 2011 and were subsequently summoned and warned by the Turkmen Ministry of Culture and Broadcasting not to appear on foreign media again. Shortly thereafter, on 28 January 2011, the authorities arrested Messrs. Kakabaev and Ovezov - along with five other singers who had appeared with them in music videos - and verbally and physically abused them. The source notes that none of these facts are contested by the Government in its response.

39. The source contends that, while it is difficult to confirm any of the Government's unsubstantiated claims due to the extreme limitations on freedom of the press and the work of human rights defenders in Turkmenistan, the Government's response leaves a number of important questions unanswered. First, if the imprisonment of Messrs. Kakabaev and Ovezov was truly in response to separate incidents unrelated to their performances, why were they arrested together with the other artists? Second, why did the Government wait until after his arrest on 28 January 2011 - nearly eight months after the alleged dispute about the television antenna, but shortly after his performance - to charge Mr. Kakabaev? Finally, on what grounds did the Government amend the sentence against Mr. Ovezov to include imprisonment, if not because of his musical performances? These outstanding questions, in conjunction with the Government's failure to address the circumstances surrounding the arrests of Messrs. Kakabaev and Ovezov, strongly suggest that their detention was ultimately motivated by their peaceful exercise of their right to freedom of expression in violation of article 19 (2) of the International Covenant on Civil and Political Rights, and is therefore arbitrary under category II of the arbitrary detention categories considered by the Working Group.

40. The source notes that the Government did not address the allegations of serious due process violations in this case. The source alleges that Mr. Kakabaev was sentenced after a closed trial - apparently only days after his indictment. It is unclear whether Mr. Ovezov was afforded any due process whatsoever when his sentence was amended to include imprisonment. The source also alleges that the Government may have held Messrs. Kakabaev and Ovezov without any access to legal representation for the duration of their detention.

Discussion

41. Although Messrs. Kakabaev and Ovezov were released, in accordance with paragraph 17(a) of its methods of work and considering the gravity of the violations alleged, the Working Group reserves the right to render an opinion whether or not their deprivation of liberty was arbitrary.

42. The Government does not refute the allegation that the singers Kakabaev and Ovezov appeared on the Turkish satellite music channel TMB in January 2011 and were subsequently summoned and warned by the Turkmen Ministry of Culture and Broadcasting not to appear on foreign media again. Nor the Government challenge the allegation that soon thereafter, on 28 January 2011, Messrs.

Kakabaev and Ovezov were arrested along with five other singers who had appeared with them in music videos.

43. Although the event for which Mr. Ovezov was arrested took place in April 2010, and the event for which Mr. Kakabaev was deprived liberty took place in June 2010, both of them were arrested on the same date along with a number of other artists in January 2011 immediately after their performance and summon by the Ministry of Culture and Broadcasting.

44. The Working Group considers that it is because of their exercising their right to freedom of expression that Messrs. Kakabaev and Ovezov were deprived their liberty. The Turkmenistan authorities considered their songs and clothing contrary to the Turkmen mentality and Government policies which are aimed at promoting patriotism among Turkmen youth.

45. In this regard, the Working Group recalls that article 19, paragraph 2, of the International Covenant on Civil and Political Rights guarantees the right to freedom of expression, including artistic expression⁴ and protects all forms of expression, including audio-visual expression.

46. The Working Group considers in this case that Messrs. Kakabaev and Ovezov were deprived of their liberty for having peacefully exercised their right to freedom of expression, as guaranteed under article 19 of the Universal Declaration of Human Rights and article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

47. Thus, the deprivation of liberty of Messrs. Kakabaev and Ovezov falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

48. The Working Group is unable to reach a conclusion regarding the alleged violations of the right to a fair trial in this case because of insufficient information related to the alleged violations.

Disposition

49. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Messrs. Kakabaev and Ovezov was arbitrary, being in contravention of article 19 of the Universal Declaration of Human Rights and article 19, paragraph 2, of the International Covenant on Civil and Political Rights, and falls within category II of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

50. Consequent upon the opinion rendered, the Working Group requests the Government of Turkmenistan to take the necessary steps to remedy the situation of Messrs. Kakabaev and Ovezov and 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.

51. The Working Group is of the opinion that, taking into account all the circumstances of the case, including the fact that they were released, the adequate remedy would be to accord Messrs. Kakabaev and Ovezov an enforceable right to compensation, in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

[Adopted on 30 April 2013]

¹See the Human Rights Committee's general comment No. 32 (2007) on article 14: Right to equality before courts and tribunals and to a fair trial, para. 28.

²Ibid., para 21.

³Ibid., para. 19.

⁴See Human Rights Committee, general comment No. 34 (2011) on article 19: Freedoms of opinion and expression, para. 11.