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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November-4 December 2015

Opinion No. 42/2015 concerning Irina Zakharchenko and Valida Jabrayilova (Azerbaijan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the 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 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 13 July 2015 the Working Group transmitted a communication to the Government of Azerbaijan concerning Irina Zakharchenko and Valida Jabrayilova. The Government replied to the communication on 11 September 2015. The State is a party to the International Covenant on Civil and Political Rights.

3. 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 sentence or despite an amnesty law applicable to him) (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Ms. Zakharchenko, 54 years of age, and Ms. Jabrayilova, 37 years of age, are residents of Baku and members of the Jehovah's Witnesses minority religious community in Azerbaijan. Ms. Zakharchenko is a person with disability.

5. On 5 December 2014, police arrested Ms. Zakharchenko and Ms. Jabrayilova in the midst of their religious activity. The officers accused them of preaching illegally. Following the arrest, the police took the two women to the station for questioning. After several hours, they were released without charges.

6. Reportedly, that day Ms. Zakharchenko and Ms. Jabrayilova were sharing their faith with the residents of an apartment complex in Baku. They were offering without charge a brochure entitled "Teach your children", designed to aid parents in teaching their children Bible stories and lessons. This brochure was approved on 11 August 2014 through decision No. DK-349/M of Azerbaijan's State Committee for Work with Religious Associations (SCWRA) for import.

7. On 9 February 2015, the Chief Investigator of the Main Investigation Office of the Ministry of National Security of the Azerbaijan Republic (MNS), Matlab Mehdiyev, summoned Ms. Zakharchenko and Ms. Jabrayilova to MNS headquarters. On 10 February, MNS agents interrogated them for hours, shouting at them and applying psychological pressure. They were released in the evening and ordered to return the next day.

8. On 17 February 2015, MNS charged Ms. Zakharchenko and Ms. Jabrayilova under article 167-2.2.1 of the Penal Code of the Republic of Azerbaijan, which prohibits production, import, sale or distribution of religious literature by an organized group without having obtained the appropriate approval. This offence is punishable with a fine of 7,000-9,000 manats (approximately \$6,600-\$8,500) or imprisonment of two to five years.

9. The source claims that charges against Ms. Zakharchenko and Ms. Jabrayilova are based on the fact that they were distributing the Bible-based brochure "Teach your children". The source argues that such activity falls under protection of the freedom of religion or belief, as the distribution of the religious literature is an integral part of the women's faith. Furthermore, the brochure was approved for internal circulation in Azerbaijan by SCWRA.

10. The same day, 17 February, MNS brought Ms. Zakharchenko and Ms. Jabrayilova before Judge Rauf Ahmadov, who, following a hearing in camera, decided to place them in pretrial detention. This was despite the legal counsels' objection that the detention was due to the women's consistent cooperation with the authorities.

11. In his ruling, Judge Ahmadov described the activity of Ms. Zakharchenko and Ms. Jabrayilova as a "threat to the public" and granted the investigator's motion to place them in detention for three months in the MSN jail. The Court ignored the fact Ms. Zakharchenko is a person with a disability and Ms. Jabrayilova is the primary caregiver for

her elderly mother. Reportedly, Ms. Jabrayilova has not received a copy of the ruling. Nevertheless, both women appealed the ruling through their lawyers.

12. On 26 February 2015, the Baku Court of Appeal denied the appeals in a closed hearing.

13. The source argues that neither the prosecutor nor the MNS investigator presented any evidence supporting the need for pretrial detention. Ms. Zakharchenko and Ms. Jabrayilova were returned to the MNS jail. Since then, it has not been possible for family or friends to visit them in jail.

14. On 6 March 2015, MNS obtained court orders and searched the homes of Ms. Zakharchenko and Ms. Jabrayilova, confiscating their religious literature, notebooks, a computer and a mobile phone.

15. On 10 March 2015, MNS, SCWRA and police presented court orders to search Kingdom Hall, which is the house of worship of Jehovah's Witnesses in Baku and the home of one of the congregation's elders. The law enforcement agents informed those present that the search was in relation to the case against Ms. Zakharchenko and Ms. Jabrayilova. The authorities found and confiscated a significant amount of religious literature and other documents. Since then, MNS has summoned more than a dozen Jehovah's Witnesses for interrogation in an effort to collect incriminating evidence against Ms. Zakharchenko and Ms. Jabrayilova.

16. On 1 April 2015, Ms. Jabrayilova, through her lawyer, filed a motion in the Baku Sabail District Court to substitute her pretrial detention with house arrest. On 4 April, Judge Elshad Shamayev dismissed the motion. On 7 April, Ms. Jabrayilova appealed to the Baku Court of Appeal. On 10 April, the Court of Appeal dismissed her appeal.

17. On 15 April 2015, Ms. Zakharchenko, through her lawyer, filed a motion in the Baku Sabail District Court to substitute pretrial detention with house arrest. On 17 April, Judge Ayten Aliyeva refused the motion. On 20 April, Ms. Zakharchenko appealed to the Baku Court of Appeal. On 27 April, the Court of Appeal dismissed her appeal.

18. On 7 May 2015, MNS applied to the Baku Sabail District Court to extend the pretrial detention of Ms. Zakharchenko and Ms. Jabrayilova for an additional two months, until 17 July 2015. The Court approved the extension of the pretrial detention. The two women appealed to the Baku Court of Appeal on 12 May. On 18 and 19 May, the Baku Court of Appeal dismissed their appeals.

19. The source argues that Ms. Zakharchenko's and Ms. Jabrayilova's deprivation of liberty is arbitrary, and falls under categories I, II, III and V of the Working Group's defined categories of arbitrary detention. In particular, their deprivation of liberty had no legal basis justifying their arrest, as they were arrested and detained by MNS personnel for distribution of a religious brochure, a lawful religious activity (category I).

20. Ms. Zakharchenko's and Ms. Jabrayilova's deprivation of liberty resulted from the exercise of fundamental rights protected by international law, in particular, rights relating to freedom of religion or belief. The two women have been treated as threats to national security when in reality their purported offence is having distributed religious literature of Jehovah's Witnesses (category II).

21. Ms. Zakharchenko and Ms. Jabrayilova were deprived of their liberty in violation of due process rights. In particular, all court hearings related to pretrial detention have been conducted in camera. The court ignored all motions of the defence, including Ms. Zakharchenko's disability and the fact that Ms. Jabrayilova is the primary caregiver to her elderly mother. Neither has been allowed to see family members, friends or religious ministers for pastoral care for more than three months. The only visitors permitted to see

them are their lawyers. MNS has forbidden the women to have access to any religious literature, including personal copies of the Bible (category III).

22. Furthermore, the source argues that Ms. Zakharchenko and Ms. Jabrayilova were arrested and detained because of their religion. Reportedly, over the past several years, the State authorities have imposed increasingly severe restrictions on the peaceful religious activity of Jehovah's Witnesses in Azerbaijan. Authorities have prohibited the import of some of their religious literature and have imposed heavy administrative fines on individual Jehovah's Witnesses as punishment for holding religious services and for speaking to others about their faith. The source asserts that the criminal prosecution of the two women is indicative of the intensity of the State authorities' campaign of persecution of Jehovah's Witnesses in Azerbaijan. Hence, their deprivation of liberty constitutes a violation of international law for reasons of discrimination based on religion (category V).

Response from the Government

23. In its response of 11 September 2015, the Government provided the Working Group with the following information.

24. On 17 February 2015, the criminal case against Ms. Zakharchenko and Ms. Jabrayilova, members of the Jehovah's Witnesses minority religious community, was instituted under article 167-2.2.1 of the Penal Code with regard to the distribution of the religious literature, namely the brochure "Teach your children", by an organized group without having obtained the appropriate approval.

25. They were arrested by the decision of the Baku Sabail District Court on the same day under the above-mentioned article of the Penal Code. On 13 April 2015, experts of the Ministry of Justice's Court Expertise Centre undertook to clarify whether the above-mentioned literature was of a religious nature and whether its import and distribution were allowed.

26. According to the opinion rendered on 26 May 2015 by the experts, the brochure "Teach your children" is of religious nature and its import and distribution were approved by the State Committee for the Work with Religious Associations of the Republic of Azerbaijan, but only within the Jehovah's Witnesses minority religious community.

27. There is no approval for individual distribution and sale of the above-mentioned literature outside the community. Currently, the investigation is being conducted in an objective and thorough manner.

28. The Government also notes that there are a number of cases in which activity of Jehovah's Witnesses was accompanied by violations of Azerbaijani legislation. Since Azerbaijan, which is still in a state of war, with 20 per cent of its territory under occupation, has not adopted legislation on alternative service, legal action has been taken against some followers of this community who refuse to serve in the army.

Further comments from the source

29. In its comments on the Government's response, the source noted that it failed to provide any rational factual or legal basis justifying the detention. In the source's view, the response confirms that the criminal case is wholly contrary to international law, and relies on extraneous and irrelevant considerations.

30. The source reiterates that the detention of Ms. Zakharchenko and Ms. Jabrayilova is arbitrary because none of the conditions for pretrial detention under the Code of Criminal Procedure of the Republic of Azerbaijan are met. The Government does not explain why it has been necessary to deprive the two women of their liberty for 10 months.

31. The source reiterates that there is no basis under the Code of Criminal Procedure to justify their pretrial detention:

(a) They have never hidden from the prosecuting authority. Prior to their arrest, they voluntarily went to the police station whenever called;

(b) They have never obstructed the normal course of the investigation or court proceedings by illegally influencing parties to the criminal proceedings, hiding material significant to the prosecution or engaging in falsification;

(c) They did not commit a further act provided for in criminal law or create a public threat;

(d) They never failed to comply with a summons from the prosecuting authority, without good reason, or otherwise evaded criminal responsibility or punishment;

(e) Aside from the fact the alleged offence is on its face unconstitutional and contrary to international law, it is not a violent, dangerous, or subversive offence. The Government's response confirms that the brochure contained no harmful elements;

(f) The authorities and courts failed to take into account the age, health, and financial and social positions of the detainees. Prior to her arrest, Ms. Jabrayilova, a hard-working young woman, lived with, and was the primary caregiver for, her elderly, ill mother. Ms. Zakharchenko has been on a disability pension since.

32. The source recalls that on 7 September 2015 the Parliamentary Assembly of the Council of Europe criticized Azerbaijan for its abuse of pretrial detention.¹ Citing examples from Azerbaijan, the Assembly noted that "abusive grounds" for pretrial detention were sometimes used, in particular to discredit political competitors, to extort bribes, or even to intimidate civil society and silence critical voices.

33. The source notes that the Government's response suggests the pretrial detention of the two women may be justified on the basis that there were a number of cases in which the activity of Jehovah's Witnesses was accompanied by violations of Azerbaijani legislation. In the source's view, Ms. Zakharchenko and Ms. Jabrayilova are being punished as part of a religiously-motivated campaign of State persecution against Jehovah's Witnesses in Azerbaijan.

34. The source considers that it is absurd to suggest Ms. Zakharchenko and Ms. Jabrayilova should be deprived of their liberty because Azerbaijan has failed to adopt a law on alternative service and has imprisoned Jehovah's Witnesses who conscientiously objected to military service.

35. The source reiterates that Ms. Zakharchenko and Ms. Jabrayilova have been denied the right to meet with close relatives or persons of legal interest to them, and to have telephone conversations while in detention. Religious officials from their community have been refused access to them to provide pastoral care and support.

36. The source also reiterates that the detention of Ms. Zakharchenko and Ms. Jabrayilova for peacefully sharing their religious faith with others is contrary to articles 18, 19, 26 and 27 of the International Covenant on Civil and Political Rights, and articles 7, 18 and 19 of the Universal Declaration of Human Rights.

37. The source recalls that the Special Rapporteur on freedom of religion or belief reiterated that Governments should widely inform the population, including appropriate law

¹ See Parliamentary Assembly of the Council of Europe, "Abuse of pretrial detention in States Parties to the European Convention on Human Rights", document 13863, paras. 82 and 83.

enforcement agencies, about the principle that registration does not constitute a precondition for practicing one's religion or belief (see A/65/207, para. 22).

38. The source concludes that the entire foundation of the criminal case against Ms. Zakharchenko and Ms. Jabrayilova is fundamentally flawed. They are being persecuted for exercising their faith, in disregard of their right to freedom of religion and freedom of expression, guaranteed by the International Covenant on Civil and Political Rights.

Discussion

Categories II and V

39. The Working Group recalls that article 18 (3) of the International Covenant on Civil and Political Rights permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.

40. The Working Group also concurs with the Human Rights Committee that the practice and teaching of religion includes the freedom to distribute religious texts or publications (see general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, para. 4).

41. The Government failed to present any argument explaining why and how the distribution by the two women of the religious brochure, which was approved by the relevant State Committee, could have been detrimental to society as a whole or to other individuals.

42. The Government's argument — that because the State had not adopted legislation on alternative service, legal action had been taken against some followers of this community refusing to serve in the army — is irrelevant to the deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova. In this regard, the Working Group also notes that more than six years previously, the Human Rights Committee expressed concern that no legal provision in Azerbaijan regulated the status of conscientious objectors to military service. Accordingly, in 2009, the Committee recommended that Azerbaijan adopt at an early date a law exempting conscientious objectors from compulsory military service and providing for alternative civilian service (see CCPR/C/AZE/CO/3, para. 14).

43. The Working Group considers that, in the case under consideration, Ms. Zakharchenko and Ms. Jabrayilova have been deprived of liberty for peacefully exercising the right to freedom of religion and belief, as guaranteed under article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights. Thus, the deprivation of liberty of the two women falls within category II of the Working Group's defined categories of arbitrary detention.

44. Furthermore, the deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova also falls within category V of the Working Group's defined categories of arbitrary detention, as they have been deprived liberty for the reason of discrimination based on their religion, in violation of article 7 of the Declaration and article 26 of the Covenant.

Category III

45. The Working Group recalls that article 9 (3) of the Covenant requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. It should not be the general practice to subject defendants to pretrial detention (see general comment No. 35 (2014) on liberty and security of person, para. 38).

46. The Government in its response did not provide any reason for the detention of the two women. Nor did the Government refute the allegation that the prosecutor did not present to the judge any evidence supporting the need for the pretrial detention.

47. Indeed, a detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime (ibid.). The relevant factors should not include vague and expansive standards such as public security (ibid.). In the case under consideration, no reasons for the detention were given.

48. The Working Group considers that the non-observance of the international norms established in article 9 of the Declaration and article 9 of the Covenant in this case is of such gravity as to give the deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova arbitrary character. Thus, the deprivation of liberty of the women falls within category III of the Working Group's defined categories of arbitrary detention.

Disposition

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

The deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova is arbitrary, being in contravention of articles 7, 9 and 18 of the Universal Declaration of Human Rights and articles 9, 18 and 26 of the International Covenant on Civil and Political Rights; it falls within categories II, III and V of the categories applicable to the consideration of the cases submitted to the Working Group.

50. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Ms. Zakharchenko and Ms. Jabrayilova, 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 believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Ms. Zakharchenko and Ms. Jabrayilova and accord them an enforceable right to compensation in accordance with article 9 (5) of the Covenant.

[Adopted on 2 December 2015]
