



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27-31 August 2012****No. 26/2012 (Sri Lanka)****Communication addressed to the Government on 22 February 2012****Concerning Pathmanathan Balasingam and Vijiyanthan Seevaratnam****The Government replied to the communication on 7 May 2012.****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, 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. Pathmanathan Balasingam, born in 1973, a national of Sri Lanka and former member of the Liberation Tigers of Tamil Eelam (LTTE), usually residing in Vavuniya, Sri Lanka, is a mason.

4. Vijiyanthan Seevaratnam, born in 1988, a national of Sri Lanka and former member of the LTTE, usually residing in Vavuniya, is a student. He had reportedly been forcibly recruited by the LTTE on 26 October 2006.

5. On 16 May 2009, Messrs. Balasingam and Seevaratnam surrendered to the Sri Lanka Army following an announcement made by the latter.

6. According to the source, Regulation No. 22, paragraph 2, of the Emergency (Miscellaneous Provisions and Powers) Regulations 2005, as amended by Emergency Regulation No. 1462/8 on 12 September 2006 and later in May 2010, provides that anyone who surrenders in relation to an offence under certain laws, such as the Prevention of Terrorism Act (PTA) would be considered a surrendee. It further requires such person to give a written statement that he or she surrendered voluntarily. According to Regulation No. 22, paragraph 4, within 10 days of the surrender, the officer to whom the person surrendered is to hand over the surrendee to the Commissioner-General for Rehabilitation. The latter in turn is to assign the person to a Protective Accommodation and Rehabilitation Centre. Once the officer to whom the person surrenders informs the Secretary to the Ministry of Defence of the surrender, the Secretary is to make an order authorizing the Commissioner-General for Rehabilitation to hold the surrendee for a period not exceeding 12 months at the centre to which he or she is assigned.

7. Prior to the expiration of this period, three options are available. First, the person could be released following a review by the Secretary to the Ministry of Defence. Second, the period of rehabilitation could be extended for a period of three months at a time. In that case the total period of extension is not to exceed a further 12 months, in compliance with Regulation No. 22, paragraph 10 (b). Third, investigations can be initiated after three months of the surrendee being assigned to a rehabilitation centre to ascertain whether the person committed any offence as stipulated in Regulation No. 22, paragraph 2, and the person may be charged with an offence pursuant to Regulation No. 22, paragraph 12.

8. The source also reports that since the lapsing of the state of emergency on 30 August 2011, the Government of Sri Lanka has issued the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011 under section 27 of the Prevention of Terrorism Act, which empowers the Minister of Defence to make regulations for the purpose of carrying out or giving effect to the principles and provisions of the Act. These new regulations reproduce verbatim the lapsed Emergency Regulations on surrendees.

9. According to the source, Messrs. Balasingam and Seevaratnam were categorized as surrendees by the Ministry of Defence and placed in a rehabilitation centre in Omanthai on

the basis of Regulation No. 22. Mr. Balasingam was taken to Joseph Camp in Vavuniya on 18 May 2009, whereas Mr. Seevaratnam remained at the rehabilitation centre in Omanthai until 30 December 2009.

10. On 28 May 2009, Mr. Balasingam was transferred to Boosa detention centre in Galle, where he remained until 2 February 2011. Mr. Seevaratnam was transferred to the same detention centre on 30 December 2009, where he remained until 11 September 2011. It was only upon their transfer to Boosa detention centre that Messrs. Balasingam and Seevaratnam became eligible for access to legal representation. However, until very recently their families were not able to secure any legal representation due to lack of financial means and knowledge of the procedure to be followed.

11. The detention of Messrs. Balasingam and Seevaratnam in Boosa detention centre was ordered under the Prevention of Terrorism Act, part III, section 9. The source reports that as at 22 February 2012, Messrs. Balasingam and Seevaratnam had been detained for 21 months, exceeding the maximum period of 18 months in detention provided for in the Act.

12. Mr. Balasingam and Mr. Seevaratnam were remanded in custody at Colombo Remand Prison by the Chief Magistrate of Colombo on 2 February 2011 and 11 September 2011, respectively. Their detention was reportedly ordered by the Ministry of Defence pursuant to section 2 of the Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 29 August 2011. It was only upon the transfer to Colombo Remand Prison that Mr. Balasingam was allowed family visits. No information is available on the family visits of Mr. Seevaratnam.

13. The source reports that only in November 2011 were the families of the two detainees able to approach a non-governmental organization that provides legal aid.

14. The source submits that the respective periods of detention of Messrs. Balasingam and Seevaratnam are arbitrary in character. First, with respect to their detention in a rehabilitation centre, the source contends that the decision-making authority on the determination of the period of rehabilitation for surrendees lies entirely with the Secretary to the Ministry of Defence. The source points out that there is no oversight or review and courts are not entitled to rule on the lawfulness of the detention, as surrendees are never produced in court. The source further informs the Working Group that persons held at rehabilitation centres do not enjoy procedural safeguards, such as the right to legal representation. Reportedly, the authorities do not recognize the right of persons undergoing rehabilitation to challenge the legality of such rehabilitation. Messrs. Balasingam and Seevaratnam were not granted such a right nor were they informed of the charges against them.

15. The source further points out that, since Regulation No. 22, paragraph 12, in force until 30 August 2011, and subsequently Regulation No. 9, paragraph 1, of the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011 do not state the period within which investigation should be concluded, prosecution could be initiated against a person at a rehabilitation centre at any time before the conclusion of the rehabilitation period. According to the source, the surrendee has no certainty regarding his or her legal position until the termination of the rehabilitation period. If the person is prosecuted and found guilty, the Court may order an undefined extension of the period of rehabilitation as part of the sentence pursuant to Regulation No. 9 of 2011, paragraphs 2 and 3 (previously pursuant to Regulation No. 22 of 2005, para. 13).

16. Finally, the source argues that the Minister of Defence exceeded his authority by issuing regulations under the Prevention of Terrorism Act. For instance, the Regulations of 29 August 2011 issued under Act provide that a person can be held at a rehabilitation centre for a maximum period of 24 months, while the maximum period of administrative detention is 18 months according to the principle act, that is, the Prevention of Terrorism Act. The

source contends that the Minister of Defence issued regulations that widen the purposes of the Act and impose onerous restrictions not envisaged in that Act.

17. According to the information received, Messrs. Balasingam and Seevaratnam continue to be held in detention and the efforts of their families, including appeals lodged with the International Committee of the Red Cross and the Human Rights Commission of Sri Lanka, have been to no avail.

18. The source emphasizes that after more than two years in detention, Messrs. Balasingam and Seevaratnam have not yet been charged nor is there any expected date for their trial. They are regularly being produced before a magistrate for the sole purpose of extending their remand. Mr. Balasingam has allegedly received a detention order dated 3 November 2011, which states as follows: “the detainee is suspected to be a member of the LTTE, participated in attacks on security force personnel and aiding and abetting the LTTE organization to commit unlawful activity”.

Response from the Government

19. The Working Group sent the Government of Sri Lanka a communication, dated 22 February 2012, requesting it to provide detailed information about the current situation of Messrs. Balasingam and Seevaratnam and to clarify the legal provisions justifying their continued detention. In its reply of 17 April 2012, the Government states that it received the request on 29 February, and required “more time than the stipulated deadline of 22 April 2012 to consult relevant line Ministries and submit an appropriate response”.

20. On 7 May 2012, the Government provided the following information relating to two individuals, Balasingham Pathmanathan and Sivaratnam Vijendren. The first individual was indicted on 1 January 2011 and the date for his next court hearing was 5 August 2012. The case of the second individual has been under consideration by the Attorney General’s Department since 25 April 2012 after the completion of the investigation.

21. The Government in its communication of 7 May 2012 raises questions relating to the determination of the identity of the two individuals. It provides information relating to Balasingham Pathmanathan, and the Working Group requested information about Pathmanathan Balasingam (different order of names and Balasingam spelled without an ‘h’), and about Sivaratnam Vijendren, where the Working Group’s request referred to Vijiyanthan Seevaratnam (different order of names and different spelling, which may be phonetically the same).

Discussion

22. The matter before the Working Group is the detention of Pathmanathan Balasingam and Vijiyanthan Seevaratnam, who have been detained since 16 May 2009. The Government’s reply indicates that a court hearing has been scheduled for Balasingham Pathmanathan on 5 August 2012, and that the case of Sivaratnam Vijendren is “under consideration by the Hon. Attorney General”.

23. The Working Group points to the fact that its communication to the Government of 22 February 2012 provided information about the date of birth, usual residence, as well as dates and different places of detention, and would expect this to be sufficient to identify the two individuals.

24. Although the Working Group is grateful for the Government’s cooperation, the Government has not provided an adequate reply to the information submitted by the source.

The Working Group regrets that the Government has not provided the requested information in the present or other cases.¹

25. The source has established a prima facie case that the detention of the two individuals does not comply with international requirements, and that it constitutes arbitrary detention. The Working Group has requested the Government to provide it with detailed information about their current situation and to clarify the legal provisions justifying their continued detention. In the absence of any further information submitted by the Government other than referred to above and taken duly into account, the Working Group must base its opinion on the case as provided by the source. According to its revised methods of work, the Working Group is in a position to render an opinion on the case on the basis of the submissions that have been made.

26. The prohibition of arbitrary detention in article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights extends to all forms of detention, along with the right to an effective remedy in article 8 of the Declaration and the due process rights in articles 10 and 11 of the Declaration and article 14 of the Covenant. This also includes instances where detention is used for “educational purposes”, as underlined by the Human Rights Committee in its general comment No. 8 (1982) on the right to liberty and security of persons. The proportionality review which determines whether a restriction on liberty can be justified is strict, and account is taken of the significant value attached to personal liberty. The measures taken are subject to criteria of legality and must be suitable, necessary and proportionate.

27. The Working Group, on the basis of the information submitted to it, notes that in view of the absence of an adequate governmental response, it appears that Messrs. Balasingam and Seevaratnam were categorized as surrendees by the Ministry of Defence in 2009 and were initially placed in the Omanthai rehabilitation centre on the basis of Emergency Regulation No. 22, paragraph 12, in force until 30 August 2011. It also appears that they were subsequently transferred to Boosa detention centre and then to Colombo Remand Prison, that they continue to be held in detention and that after more than two years in detention, they have not yet been charged nor is there any expected date for their trial.

28. The Working Group finds that the detention of Messrs. Balasingam and Seevaratnam runs contrary to article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, which stipulate that no one may be subjected to arbitrary arrest or detention. The detention of Messrs. Balasingam and Seevaratnam is also inconsistent with article 10 of the Declaration and article 14 of the Covenant, which state that everyone is entitled to a fair and public hearing by an independent and impartial tribunal. The Working Group holds that indefinite detention of surrendees in a rehabilitation centre without judicial oversight or review of the lawfulness of their detention constitutes arbitrary detention in and of itself.

29. A fundamental aspect of the right not to be arbitrarily detained is the possibility of contesting the legality of one’s detention. According to article 9, paragraph 4, of the International Covenant on Civil and Political Rights, anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

30. In the present case, there has been no oversight or review of the lawfulness of the detention of these two individuals. Messrs. Balasingam and Seevaratnam have been unable

¹ See, inter alia, opinion No. 49/2011 (Sri Lanka), adopted on 2 September 2011.

to contest the legality of their detention before a competent tribunal; they have not enjoyed procedural safeguards, such as the right to legal representation, nor were they informed of the charges against them. They have also not had regular access to their families.

31. Their detention falls within categories I and III of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

Disposition

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

The deprivation of liberty of Pathmanathan Balasingam and Vijjyanthan Seevaratnam is arbitrary and in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. Their detention falls within categories I and III of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

33. As a result of the opinion rendered, the Working Group requests the Government of Sri Lanka to take the necessary steps to remedy the situation of Mr. Balasingam and Mr. Seevaratnam 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.

34. The Working Group holds that the adequate remedy, under the specific circumstances of these cases, is to release Mr. Balasingam and Mr. Seevaratnam and to accord them compensation in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

[Adopted on 29 August 2012]