



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. 50/2012 (Sri Lanka)****Communication addressed to the Government on 3 September 2012****Concerning Uthayakumar Palani****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. The case summarized hereafter has been reported to the Working Group on Arbitrary Detention as follows.

4. Uthayakumar Palani, a Sri Lankan Tamil, born on 14 September 1973, usually residing in Settiyalurichchy, Pooneryn, Sri Lanka, is a mason.

The circumstances surrounding the arrest and detention of Mr. Palani

5. During the last phase of the war in Vanni, Sri Lanka, Mr. Palani was forcibly recruited by the Liberation Tigers of Tamil Eelam (LTTE). On 6 May 2009, he surrendered to the Sri Lankan Army (SLA) at Matalan, after an announcement was made by the army asking anyone who had been a part of the LTTE, even for a day, to surrender and register with the SLA.

6. Mr. Palani was categorized as a “surrendee” by the Ministry of Defence on the basis of Emergency Regulation (ER) 22 of Emergency (Miscellaneous Provisions and Powers) Regulation No. 01 of 2005 as amended on 12 September 2006. Regulation 22(2) did not provide a clear definition of a “surrendee” except to state 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 required the person to give a written statement that she or he surrendered voluntarily.

7. Under the authority of the Commissioner General for Rehabilitation and the Ministry of Defence, Mr. Palani was placed in a rehabilitation centre in Nelukkulam camp, Vavuniya, where he remained until December 2009. He was then transferred to Boosa, Galle detention centre, where he remained until September 2011. Finally, in September 2011, Mr. Palani was produced before a judge and remanded in custody in Colombo Remand Prison.

Source’s contention regarding the arbitrary character of the deprivation of liberty

8. The source contends that the legal basis underlying the continued detention of Mr. Palani is not in conformity with the applicable international norms and standards. Regarding ER 22 (in force until 30 August 2011) and, at present, the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011, the source points out that the decision-making authority with regard to the determination of the status of a “surrendee”, including the determination of the period of rehabilitation, remains entirely with the Ministry of Defence. No judicial or other form of oversight or review is available to determine the lawfulness of the placement in a rehabilitation centre. According to the source, this is in violation of article 9, paragraph 4, of the International Covenant on Civil and Political Rights (ICCPR).

9. Mr. Palani, alongside other individuals held in rehabilitation centres, has not benefited from any procedural safeguards, including the right to legal assistance and representation, in alleged violation of principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Surrendees are reportedly not informed of the charges against them or the reasons for their detention for rehabilitation in alleged breach of article 9, paragraph 2, of the ICCPR.

10. Further, ER 22 (12), in force until 30 August 2011, and since that date, Regulation 9(1) of the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011, do not state the period within which an investigation should be concluded. This allows prosecution to be initiated against a person at the rehabilitation centre at any point before the conclusion of the specified period of rehabilitation. The surrendee has thus no certainty regarding his or her legal position until the completion 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 ER 22(13) and Regulations 9(2) and (3) of the Prevention of Terrorism Regulations No. 5.

11. The source further contends that in the light of section 27 of the PTA, regulations can be issued by the Minister of Defence “for the purpose of carrying out or giving effect to the principles and provisions of this Act”. According to the source, the Minister does not have the power to create new offences, which can only be done through new legislation passed by the Parliament or by way of a proclamation of a state of emergency. The source contends that in contravention of these principles, the regulations issued under the PTA stipulate, for example, 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 under the PTA. Since regulations issued under the PTA should not widen the purposes of the PTA or impose onerous restrictions not contained under the PTA, the source submits that the Minister exceeded his authority by issuing the regulations.

12. The source refers to the findings of the Human Rights Committee, according to which several provisions of the PTA are incompatible with articles 4, 9 and 14 of the ICCPR (Concluding observations of the Human Rights Committee: Sri Lanka (CCPR/CO/79/LKA of 1 December 2003, para. 13). The PTA allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court (sect. 7), and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence (sect. 9). The PTA also eliminates the power of the judge to order bail or impose a suspended sentence, and places the burden of proof on the accused that a confession was obtained under duress.

13. In the light of the foregoing, the source submits that Mr. Palani’s detention under ER 22 (in force until 30 August 2011) and the present Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations is arbitrary being in violation of articles 9 and 14 of the ICCPR.

Response from the Government

14. The Working Group transmitted the above allegations to the Government of Sri Lanka on 3 September 2012 requesting it to provide, in its reply, detailed information about the current situation of Mr. Palani and the legal provisions justifying his continued detention.

15. It is regretted that the Working Group has not received a response from the Government.

Discussion

16. In the absence of a response from the Government and based on its methods of work, the Working Group is able to render an opinion in the light of the information submitted to it.

17. At the outset, the Working Group notes with deep concern that a consistent pattern of cases emanating from Sri Lanka relates to persons that have been deprived of their liberty under ER 22 (in force until 30 August 2011) and the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations.¹ In the present case, Mr. Palani was hired by the LTTE during the last days of the insurgency; he became a “surrendee” and voluntarily handed himself over to the authorities who placed him in a rehabilitation centre (from 6 May 2009 until December 2009). Thereafter, he was transferred to Boosa, Galle detention centre, where he remained until September 2011 after which Mr. Palani was finally produced before a judge. He is said to be currently detained at the Colombo Remand Prison. It is over three years that Mr. Palani has been in detention and there is no indication that he will be released or brought to trial.

18. The combination of civilian and emergency regulations in Sri Lanka has resulted in a worsening situation for the protection of human rights, a state of facts that has been pointed out by national, regional and international organizations including the United Nations. The case in hand is one of many that have come to light as a result of lack of respect for human rights, in reaction to the conflict and post-conflict situation in Sri Lanka.²

19. For a long time Sri Lanka has been under emergency laws, the foundation of which dates back to British colonial rule and the Public Security Ordinance 1947 (PSO) which has enabled declarations of emergency regulations in the country ever since. The second law in this regard is the Prevention of Terrorism (Temporary Provisions) Act 1979. Human rights advocates and the international community have repeatedly called for the repeal or amendment of these laws as these have resulted in dissipating the core of rights protecting persons deprived of their liberty including rules governing detention, due process and the right to a fair trial. Since 2005, the PSO has been used to enact a total of 20 regulations by the Government of Sri Lanka leading to undermining of the human rights regime in general and in particular the rights related to arrest, detention and fair trial.

20. A number of emergency laws in Sri Lanka allow military personnel to perform functions usually carried out by normal law enforcement officials. Regulations 19 and 20 of EMPPR 2005 give the armed forces powers of: search and seizure, and arrest and detention without warrant; police powers in dealing with prisoners; the powers of a police officer under any emergency regulation; and the power to question a person in detention.

21. Furthermore, section 19 of the Emergency Regulations 2006 provides specific immunity for actions taken under these regulations. It provides that: “No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.”

22. Similar immunity provisions are contained in regulation 73 of EMPPR 2005, the PSO (sects. 9 and 23) and the PTA (sect. 26). These provisions seek to severely limit the accountability of civilian and military authorities exercising emergency powers, provided that the action of the official took place in the course of discharging official duties. Further, the overly vague definitions of offences, sweeping powers to the military, arbitrary grounds

¹ Opinion 26/2012 (Sri Lanka) concerning Pathmanathan Balasingam and Vijiyanthan Seevaratnam.

² See also opinion 30/2008 (Sri Lanka) and opinion 38/2012 (Sri Lanka) concerning Gunasundaram Jayasundaram, available at <http://www.unwgadatabase.org/un/>.

for arrest and detention, erosion of fair trial and due process rights, and the curtailing of fundamental freedoms endanger the life, liberty and security of the people.

23. It is important to note that the Emergency Regulations are in operation despite the fact that on 9 June 2010, the Government of Sri Lanka informed the Human Rights Committee that:

The recent amendments to the Emergency Regulations that have come into effect from 2 May 2010 are in keeping with the consistent commitment of Sri Lanka towards the promotion of human rights and the maintenance of strong judicial safeguards. It is in this context that the Government of Sri Lanka at the outset wishes to enumerate the terminations of derogations of the following ICCPR articles [: 9 (2), 12, 14 (3), 17 (1), 19 (2), 21 and 22 (1)] ...

24. It is important also to note that Mr. Palani was detained as a “surrendee” under ER 22 (in force until 30 August 2011). After ER 22 expired in 2011, Mr. Palani’s detention was further extended, this time under the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations. Both of these laws are in direct conflict with the basic minimum standards of international human rights as applicable to persons deprived of their liberty. Furthermore, the manner in which Mr. Palani’s detention was extended under the Prevention of Terrorism Regulations had also been arbitrary and without any judicial oversight or review. In cases such as Mr. Palani’s, detainees are at the mercy of the law enforcing authorities. These same authorities can also contribute to the delay in processing of these cases before the courts.

25. The Working Group has in its past reports, stated its concerns regarding the use of various counter-terrorism laws by States that result in the arbitrary deprivation of liberty of persons. It noted that that there was a continuing tendency to use deprivation of liberty in the context of States’ legitimate fight against terrorism. However, the Working Group considers it necessary to reiterate that some States continue to use deprivation of liberty without charges or trial or other applicable procedural guarantees against persons accused of terrorist acts in the implementation of criminal policies against terrorism, a practice which is contrary to international human rights instruments.³

26. The prohibition of arbitrary detention in articles 9 of the Universal Declaration of Human Rights (UDHR) and the ICCPR extends to all forms of detention, with the right to an effective remedy in article 8 of the UDHR and article 9, paragraph 5, of the ICCPR. Due process rights are stated in article 10 of the UDHR and article 14 of the ICCPR. The prohibition of arbitrary detention also extends to situations where detention is used for “educational purposes” (see Human Rights Committee 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 takes into account the high value attached to personal liberty. Measures taken are subject to the legality criteria and must be suitable, necessary and proportionate.

27. The Working Group would like to remind the Government of Sri Lanka of its duties to comply with international human rights obligations including the duty not to detain arbitrarily, to release persons arbitrarily detained and to provide compensation to them. In a number of opinions, the Working Group has

recalled that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law, may constitute crimes against humanity. The duties to comply with international human rights that are peremptory and *erga omnes* norms such as the prohibition of arbitrary detention rests not only on the Government but on

³ A/HRC/10/21; A/HRC/7/4; E/CN.4/2005/6; E/CN.4/2004/3.

all officials, including judges, police and security officers, and prison officers with relevant responsibilities. No person can contribute to human rights violations.⁴

Disposition

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

The deprivation of liberty of Mr. Uthayakumar Palani is arbitrary, and constitutes a breach 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, falling within category III of the categories applicable to the cases submitted to the Working Group.

29. The Working Group requests the Government to take the necessary steps to remedy the situation, which include the immediate release of Mr. Palani and adequate reparation to him.

30. The Working Group brings to the attention of the Government, the recommendations of the Human Rights Council that national laws and measures aimed at combating terrorism shall comply with all obligations under international law, in particular international human rights law.⁵

31. Finally, the Working Group recalls the Human Rights Council's request that States take into account the Group's views and, where necessary, take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty. States are also invited to extend their cooperation to the Group's requests for information and to give due consideration to the recommendations it has made.⁶

[Adopted on 19 November 2012]

⁴ Opinion No. 47/2012, para. 22. See also footnote 1 above.

⁵ Human Rights Council resolution 7/7 of 27 March 2008 on protection of human rights and fundamental freedoms while countering terrorism.

⁶ Resolution 15/18 on arbitrary detention adopted by the Human Rights Council at its fifteenth session (A/HRC/RES/15/18), paras. 3, 4 (a) and 9.