



General Assembly

Distr.: General
1 July 2014
English
Original: Spanish

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-ninth session, 22 April–1 May 2014

No. 9/2014 (Cuba)

Communication addressed to the Government on 13 September 2013

Concerning Iván Fernández Depestre

The Government replied to the communication from the Working Group on 11 November 2013.

The State is not 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. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex), 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);

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(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. Iván Fernández Depestre is a 40-year-old Cuban citizen, an activist in political opposition groups not recognized by the authorities, such as the Movimiento por el Despertar de la Juventud (Youth Awakening Movement), the Coalición de Oposición del Centro (Central Opposition Coalition) and the Frente Nacional de Resistencia Cívica y Desobediencia Civil Orlando Zapata (Orlando Zapata National Civic Resistance and Civil Disobedience Front).

4. This person was reportedly arrested on 30 July 2013 in Placetas, in the central province of Villa Clara, by officers of the State Security Department. The arrest took place while Mr. Fernández Depestre was engaged in a peaceful demonstration to commemorate the anniversary of the death of Cuban national hero Frank País. Five other people were arrested along with Mr. Fernández Depestre. These persons were released after making statements.

5. Pursuant to articles 78 to 84 of the Criminal Code, Mr. Fernández Depestre was charged with “pre-criminal social dangerousness”(a concept defined in Cuban criminal law as “a person’s special proclivity to commit offences”) and with associating with antisocial elements.

6. According to the source, the concept of “pre-criminal social dangerousness” is used in punishing those who, while not having committed an offence, behave in a manner that is dangerous for society and makes them inclined to commit offences. It is usually applied to drunkards and drug addicts, but also in punishing those who express dissident opinions, government critics and political opponents. People who have not yet committed an offence of any kind but may do so in the future are punished, i.e., according to the source, people are sentenced to prison not for what they have done, but for what they might do.

7. On 2 August 2013, a hearing was held in the municipal court of Placetas, Villa Clara, at which Mr. Fernández Depestre was found guilty of “pre-criminal social dangerousness”. According to the source, Mr. Fernández Depestre was not assisted by a defence counsel during the trial.

8. Mr. Fernández Depestre went on hunger strike in protest at his arrest. On 26 August 2013, he was taken to the Arnaldo Milián Hospital, where he was kept for one day. He was subsequently transferred to the infirmary at Guamajal Prison in Santa Clara, where he is now.

9. The source adds that imprisoning this person is illegal under Cuban criminal law, as the articles mentioned above stipulate that persons who are found guilty of pre-criminal social dangerousness and associating with antisocial elements must be sent to labour or special education establishments or a worker cooperative, but not to prison.

10. The source adds that, under Cuban criminal law, Mr. Fernández Depestre should have received an “official warning” prior to his arrest. Article 75 of the Criminal Code

states that this is an official document in which the reasons for the warning and any statements by the person concerned must be recorded. The document must be signed by both parties. Mr. Fernández Depestre did not receive any warning, even oral, prior to his arrest.

11. The source concludes that the only grounds for Mr. Fernández Depestre's arrest were his free expression of political ideas and opinions and his activism in opposition groups. He has been convicted for peaceful participation in protests and demonstrations. His arrest therefore runs counter to articles 9, 10, 19 and 20 of the Universal Declaration of Human Rights and falls under categories II and III, as applied by the Working Group in its consideration of cases of detention.

Response from the Government

12. In its reply of 11 November 2013, the Government states that all the accusations levelled by the source are false and constitute misrepresentations.

13. The Government contends that the complainant was not deprived of his liberty because of his ideas or for participating in opposition groups, but rather as a result of his long criminal record, and also maintains that in his home town he has become known for his moral degeneracy, including sexual harassment of women in public. His record includes arrests for involvement in illegal gaming, prison disturbances and prisoner escapes and, on one occasion, for robbery with violence, demonstrating his antisocial and criminal conduct. As a result, he has on seven occasions been warned of the consequences of his behaviour.

14. Some time later, this person became involved in organizations opposed to the political system chosen by the sovereign Cuban people, and tried to obtain the support of persons funded by the Government of the United States of America to undermine public order, for which he was fined.

15. His current deprivation of liberty is the result of a sentence handed down by the municipal court of Placetás on 13 July 2013, after a trial in which all legal and procedural safeguards were observed, and in which the judge ensured that the defendant was present throughout the proceedings. The Government adds that, during the trial, the defendant received legal assistance from the local Organization of Collective Law Firms, and that his lawyer had access to the case file and attended all the hearings.

16. According to the Government, all due process guarantees were respected during the judicial proceedings.

17. In its report, the Government maintains that Mr. Fernández Depestre was subjected to preventive measures designed to stop persons whose behaviour habitually contravenes social convention from committing offences. The imposition of these measures may be appealed in the appellate court.

18. Between August and September 2013, Mr. Fernández Depestre went into "voluntary starvation" in protest at the measures that had been applied to him, and he received appropriate health care and a visit from his immediate family.

19. The Government states that the rules of the Declaration of Malta on Hunger Strikers apply in Cuba and were observed in relation to Mr. Fernández Depestre.

20. Lastly, the Government asks the Working Group to find the accusations against Cuba false.

Comments from the source

21. In its reply, the source alleges that hundreds of people are deprived of their liberty in Cuba on account of their political ideas, and insists that Mr. Fernández Depestre is one of

them. It contends that the Cuban authorities do not provide concrete information on the specific legal provisions under which Mr. Fernández Depestre was found guilty, in line with long-standing practice, and only refer to preventive measures established in national legislation, such as the one on dangerousness set forth in article 72 of the Cuban Criminal Code, which defines a dangerous disposition as a person's special proclivity to commit offences, as demonstrated by conduct that is manifestly contrary to the standards of socialist morality.

22. The source insists that, contrary to what the Government has stated, due process guarantees have not been applied in the case of Mr. Fernández Depestre's detention.

Discussion

23. The Working Group has previously considered detentions in Cuba to be arbitrary when persons are deprived of their liberty for a long period on the basis of their alleged dangerousness, with no reference to specific acts defined with the rigour that has been required by international criminal law since at least the eighteenth century, and which is now enshrined in article 11, paragraph 2, of the Universal Declaration of Human Rights: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." (See Opinion No. 17/2013 [Cuba] concerning the detention of Ulises González Moreno.)

24. International standards require that the deprivation of a person's liberty be based on a specific act justifying their arrest. This specific act must be an offence defined as such in law. Detention based on the risk that a person may commit an offence has no grounding in international human rights law, and the deprivation of liberty complained of is therefore arbitrary under category II of the Working Group's methods of work. This opinion is based mainly on the Government's statements in its response to the allegations submitted to it: Mr. Fernández Depestre was subjected to "preventive measures designed to stop persons whose behaviour habitually contravenes social convention from committing offences", from which it is abundantly clear that it was not the commission of an offence, but rather the risk of him committing an offence, not specified, that was the root cause of his arrest and what has become a lengthy period in detention.

25. The Working Group will not consider proven the allegation that the detention is arbitrary owing to the serious 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 State concerned.

26. The Working Group therefore considers that the deprivation of Mr. Fernández Depestre's liberty results from the exercise of his human right to the freedoms of opinion, expression and association enshrined in articles 19 and 20 of the Universal Declaration of Human Rights, rendering the detention arbitrary under category II of the Working Group's methods of work.

Disposition

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

The deprivation of liberty of Iván Fernández Depestre is arbitrary under category II of the Working Group's methods of work.

28. The Working Group makes the following recommendations to the Government of Cuba:

- (a) Order the immediate release of Iván Fernández Depestre;

(b) Adopt effective measures to provide redress in view of the severity of the prison sentence imposed despite the fact that no acts or omissions constituting offences had previously been committed;

(c) Amend Cuban national legislation to the extent that it permits deprivation of liberty even when no criminal offence has previously been committed.

29. Consider becoming a State party to the International Covenant on Civil and Political Rights, which has been in force for 38 years.

[Adopted on 23 April 2014]
