United Nations A/HRC/WGAD/2015/1

General Assembly

Distr.: General
6 July 2015
English
Original: Spanish

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-second session, (20-29 April 2015)

No. 1/2015 (The Bolivarian Republic of Venezuela)

Communication addressed to the Government on 16 September 2014

Concerning Vicenzo Scarano Spisso

The Government has not replied 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 the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and 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, 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);

* The Bolivarian Republic of Venezuela ratified the Covenant on 19 May 1978.

Please recycle

(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 communication refers to Vincenzo Scarano Spisso, a Venezuelan citizen. He was elected mayor of the municipality of San Diego (Carabobo State) on 8 December 2013, as attested by the confirmation of his appointment issued by the National Electoral Council on 9 December 2013, and he was sworn in before the Municipal Council of San Diego on 17 December 2013, as recorded by Report No. 061-2013, published in the *Gaceta Municipal*, special issue 2549, of 19 December 2013.

4. According to the source, protests and demonstrations triggered by socioeconomic difficulties impacting on society occurred in the Bolivarian Republic of Venezuela as from the beginning of February 2014. One of the forms taken by these protests was the erecting of "barricades" with members of the public placing objects in roads in order to impede the normal flow of traffic. There were pro and anti-Government demonstrations in various parts of the country. The protests which erupted on 4 February 2014 left at least 37 people dead and 550 injured.

5. It was against this backdrop that on 7 March 2014 a group of alleged representatives of haulage companies brought an action before the Constitutional Chamber of the Supreme Court of Justice against Mr. Scarano and Salvatore Lucchese, the Deputy Director of the Municipal Police, requesting the protection of unspecified collective interests on account of the defendants' alleged failure to remove the "barricades" in San Diego, and specifically on the Barbula-Yagua section of the motorway, which is managed by the national authorities.

6. On 12 March 2014 the Constitutional Chamber declared the suit admissible and, on the grounds that Mr. Scarano and Mr. Lucchese had allegedly violated the right of free movement, it ordered precautionary measures of constitutional *amparo* requiring the defendants generally to prevent the erection of barricades and guarantee the free flow of traffic.

7. Notice of these precautionary measures was served on Mr. Scarano and Mr. Lucchese on Friday 14 March 2014, the point at which the three-day period for objecting to the precautionary measures started to run under article 164 of the Supreme Court Act.

8. The source states that during the night of 17 March 2014 the Constitutional Chamber suddenly issued a summons to Mr. Scarano and Mr. Lucchese to appear at a public hearing within the following 96 hours to defend themselves, given that "information has been published in the press indicating an apparent failure to comply with the constitutional injunction set forth in judgement No. 136 of 12 March 2014, and deemed by this Chamber to be a matter of common knowledge, of which it takes judicial notice". The summons gave no reasons, grounds or explanations of how they had allegedly failed to comply with the precautionary measure.

9. On 18 March 2014 they appeared at the Constitutional Chamber in order to lodge a written objection to the precautionary measures in which they contended, inter alia,

that since 11 March 2014 no "barricades" had been erected in the area under the jurisdiction of the San Diego authorities and that the precautionary measures could not therefore be executed. While they were at the Constitutional Chamber the defendants saw from the notice board that the hearing to which they had been summoned was scheduled for the following day, 19 March 2014.

10. On 19 March 2014, just minutes before the opening of the public hearing, the Constitutional Chamber rendered a decision declaring the objection to the precautionary measures "unallowable".

11. At the hearing on 19 March 2014 before the Constitutional Chamber the defence adduced 131 items of evidence, including testimony from 48 witnesses, various press and media reports showing that the mayor had taken action, a proposal for a judicial inspection, whereby the Constitutional Chamber would convene in San Diego and check whether any barricades had in fact been erected, in addition to documentary evidence and a video of a citizens' meeting held on Monday, 10 March 2014. Only five of the proposed 48 witnesses were admitted and only the first four minutes of the approximately 70-minute video were shown.

12. The Ombudsman's Office and the Attorney General's Office presented six witnesses, five of whom were members of the National Guard, who testified that the violence in San Diego had occurred only on 19 and 20 February. A resident of San Diego said that the mayor had indeed taken down the barricades. Two of the five witnesses who spoke in defence of Mr. Scarano and Mr. Lucchese were representatives of urban transport companies from the municipality, two others were resident members of the community councils of the El Tulipán housing estate and one was a resident of the La Esmeralda housing estate. All agreed that there had been no barricades in the municipality after 11 March 2014.

13. According to information supplied by the source, the hearing before the Constitutional Chamber lasted for approximately six hours. At the end of it, the Chamber found that Mr. Scarano and Mr. Lucchese had purportedly failed to carry out the precautionary measures and on those grounds it sentenced the mayor to 10 months and 15 days' imprisonment and "cessation of duties". The source emphasizes "cessation of duties" that in Venezuelan law is not a legal concept and that the implications of this notion were not elucidated in the judgement.

14. The source states that the Constitutional Chamber has no criminal jurisdiction over persons either under article 336 of the Constitution or under article 25 of the Supreme Court Act. For this reason, the Constitutional Chamber violated the human right to be tried by a duly appointed (natural) judge and manifestly usurped the functions of the Public Prosecution Service and the criminal courts. If there had been contempt of court, which carries a criminal sentence, proceedings should have been taken by the Public Prosecution Service in a criminal court, in accordance with article 285, paragraph 4, of the Constitution. The Constitutional Chamber turned itself into an inquisitorial criminal court.

15. There was also a breach of due process in that Mr. Scarano and Mr. Lucchese were never informed in what the alleged contempt consisted, thereby infringing the guarantees of the right of defence laid down in article 49, paragraph 1, of the Constitution and article 14 of the Covenant. The proceedings in this case were not in conformity with the law, since an instance of alleged contempt must be reported to the Public Prosecution Service in order that it may conduct investigations and, if it considers the allegation justified, indict the suspect in a criminal court.

16. According to the source, two rights established in article 49 of the Constitution and article 14 of the Covenant were breached, namely the guarantee of being tried by one's natural judge, since the Constitutional Chamber was not competent to hear and

decide a case of this kind, and the right of review, since there is no court higher than the Constitutional Chamber of the Supreme Court of Justice with which an appeal might be lodged against an arbitrary sentence.

17. The principle of the presumption of innocence was also breached, because the decision of 17 March 2014, in which the persons concerned were summoned to the hearing, virtually found them guilty of contempt already. Similarly, the political rights set forth in articles 62 and 63 of the Constitution and article 25 of the Covenant, concerning the right to vote and to be elected and the exercise of popular sovereignty, in this case through the vote of the municipal electorate of San Diego, were violated since the Constitutional Chamber ordered the cessation of the mayor's functions, an act for which neither it nor any court in the country was competent. Definitive and temporary absences of mayors are regulated by article 87 of the Municipal Authority Act which deems the "cessation of functions" of a mayor to be an absence.

18. The source goes on to state that the mayor's detention and the "cessation of functions" ruling likewise breached the right of political participation and respect for the will of the people, which is protected by article 25 of the Covenant.

19. The right to be tried by a competent court (the right to be tried by a natural judge) was violated because the Constitutional Chamber acted as both prosecutor and criminal court without possessing the lawfully predetermined competence for this. The person was sentenced for the alleged commission of an offence. However, for this to be possible, the Public Prosecution Service (Attorney General's Office) must first conduct an investigation and prefer a charge, then the accusation must be substantiated and a criminal court must render a decision on it. The Constitutional Chamber, by simultaneously acting as prosecutor and criminal court, greatly exceeded the scope of its jurisdiction.

20. In the past, the Constitutional Chamber expressly ruled that, in accordance with the Constitution and Venezuelan legislation, the competence to pass a criminal sentence for the offence of contempt lies with an ordinary criminal court in the judicial district where the crime was allegedly committed (in the instant case, Carabobo State). Another prerequisite is that a charge must have been laid by the Public Prosecution Service, which is responsible for initiating criminal proceedings, after it has conducted objective criminal investigations. In this case, the Constitutional Chamber violated article 285 of the Constitution and usurped the constitutional powers of the Public Prosecution Service by disregarding the requirement first that a criminal investigation be held and then that a charge be brought. It also usurped the powers of the criminal courts. Article 24 of the Code of Criminal Procedure stipulates that criminal proceedings must be brought by the Public Prosecution Service of its own motion. Once the Public Prosecution Service has done this, the competent tribunal to hear the case is the trial court in the municipality where the alleged offence was committed.

21. In this case, Mr. Scarano's right to be tried by a competent tribunal was violated because, under Venezuelan legislation, the competent bodies for prosecution and trial were the Public Prosecution Service, a procedural court of Carabobo State and a trial court of Carabobo State. The human right of the presumption of innocence and the right to have adequate time and facilities to prepare one's defence were also breached. This person was subjected to rushed summary proceedings lasting barely two days where he was not given the requisite time to prepare an adequate and proper defence in conformity with the law. He was summoned to a hearing on 17 May 2014 and two days later, on 19 May, he was sentenced and arbitrarily deprived of his liberty.

22. The source adds that the human right to present proof of one's innocence has also been violated, because the Constitutional Chamber arbitrarily and without any

justification prevented the bringing of evidence proposed by the defendant. Lastly, the criminal sentence handed down by the Constitutional Chamber of the Supreme Court of Justice violated the human right of review and appeal, because this person was not tried by the competent court but by the highest court of the country.

23. The source considers that the detention of this person is arbitrary and falls into categories I, II and III of the classification used by the Working Group when considering cases of detention.

(a) Category I: deprivation of liberty was applied by the State through the Constitutional Chamber of the Supreme Court of Justice, which invented legal grounds for restricting human rights related to personal liberty and political participation. The Venezuelan legal system offers no legal grounds — and thus none can be invoked — justifying this detention, since in Venezuelan legislation the offence of "contempt" criminalizes the failure to comply with final judgements of constitutional *amparo*, whereas in this case the decision was one ordering precautionary measures. Article 31 of the Protection of Constitutional Rights and Guarantees Act reads, "Any person who fails to comply with a court order of constitutional *amparo* shall be punished by between six (6) and fifteen (15) months' imprisonment". In establishing the offence of which the defendant stood accused, the Act refers to an order of constitutional *amparo* (*mandamiento de amparo constitucional*), whereas in the instant case the alleged criminal conduct was failure to comply with a precautionary measures of *amparo* (*medida de amparo cautelar*), which does not represent a determination of the substance or merits of the *amparo* case. The Constitutional Chamber gave a broad interpretation to a provision of criminal law (art. 31) in order to restrict fundamental rights, something which is prohibited in a State governed by the rule of law, where offences must always be construed restrictively. Under this broad interpretation, the *amparo* order was understood, not as a final judgement, but as a precautionary measure — otherwise there would have been no grounds for imprisonment.

(b) Category II: the deprivation of liberty was politically motivated and resulted from the exercise of human rights guaranteed by articles 19, 21, 22, 25 and 26 of the Covenant. The President of the Republic has made numerous public statements threatening opponents. The source states that the situation with regard to the separation of powers is extremely precarious and that as a result the Venezuelan judiciary is under the influence of the Executive.

(c) Category III: in the instant case, the guarantees of the right of defence and of due process were not respected. The Constitutional Chamber manifestly breached article 14 of the Covenant.

Response from the Government

24. Since the Government of the Bolivarian Republic of Venezuela did not refute the truth of the information supplied by the source, the Working Group accepts this information *prima facie* as reliable.

Discussion

25. Mr. Scarano was mayor of San Diego (Carabobo State). He was elected in December 2013. On 19 March 2014, the Constitutional Chamber of the Supreme Court of Justice of the Bolivarian Republic of Venezuela ruled that he had failed to carry out the precautionary measures of *amparo* which the Chamber had ordered on 12 March 2014 for the alleged violation of the right of free movement, because he had not prevented the erection of barricades in his municipality, and specifically on the Barbula-Yagua section of the motorway. The Constitutional Chamber examined a

claim against certain mayors of the country seeking protection of unspecified collective interests and issued a precautionary injunction on persons unnamed to guarantee free movement.

26. On 18 March 2014 Mr. Scarano appeared before the Constitutional Chamber in order to lodge a written objection to the precautionary measures. He stated that no barricades had been erected since 11 March and that the precautionary measures could not therefore be implemented. On 19 March the Constitutional Chamber declared the objection to the precautionary measures to be "unallowable". It also found that Mr. Scarano had failed to carry out the precautionary measures and tried him in criminal proceedings for the offence of contempt. The Constitutional Chamber, acting as a criminal court, sentenced Mr. Scarano to 10 months and 15 days' imprisonment for the offence of contempt and ordered the cessation of his duties as mayor. Mr. Scarano was freed on 4 February 2015 after serving his full sentence.

27. Based on the information it has received, the Working Group considers that under article 336 of the Constitution and article 25 of the Supreme Court of Justice Act, the Constitutional Court has no competence to hold a criminal trial of a person. The Constitutional Court therefore usurped the functions of the Public Prosecution Service and the criminal courts.

28. In the opinion of the Working Group the fundamental guarantees of due process were also infringed. Before the hearing at which he received a prison sentence, Mr. Scarano was not informed that he was accused of an offence or of the charges against him. The Public Prosecution Service did not serve any notice on Mr. Scarano and did not prefer any criminal charge against him. For this reason, his right of defence under article 14 of the Covenant and article 49, paragraph 1, of the Constitution was breached.

29. At the hearing before the Constitutional Chamber on 19 March 2014 only five of the 48 defence witnesses were admitted. Only the first four minutes of a 70-minute video presented by the defence was shown. The whole hearing lasted for only six hours. The defendant was not given enough time to present all his exculpatory evidence or to substantiate his rebuttal of the Constitutional Chamber's accusation.

30. The Constitutional Chamber itself has stated that competence to convict a person of the offence of contempt lies with an ordinary criminal court in the judicial district where the offence is alleged to have been committed and that to this end the Public Prosecution Service must also lay a charge. The Code of Criminal Procedure provides that the courts' territorial jurisdiction is determined by the place where the offence or omission occurred. The Code states that municipal trial courts are competent to act as procedural courts in the case of publicly actionable offences carrying prison sentences of no more than eight years. Accordingly the bodies competent to prosecute and try Mr. Scarano were the Public Prosecution Service, a procedural court of Carabobo State and a trial court of that State.

31. The Working Group further considers that, since the Constitutional Chamber was not a tribunal competent to hear and judge a case of this kind, the guarantee of the right to be tried by a natural judge was infringed. The right of review established in article 14 of the Covenant and article 49 of the Constitution was violated because there was no possibility of obtaining a review of or appealing against the judgement. The right to the presumption of innocence was also violated.

32. The offence of contempt criminalizes failure to comply with final judgements of constitutional *amparo*, and which are not comparable to decisions regarding precautionary measures of *amparo*. As stated in the information submitted by the source, precautionary measures of *amparo* do not represent a determination of either the substance or merits of an *amparo* case. A decision concerning precautionary

measures is not a final judgement. There is therefore no legal basis justifying the detention of this person and consequently it is impossible to invoke one. Accordingly his detention is arbitrary and falls into category I of the Working Group's classification.

33. By ordering the cessation of Mr. Scarano's duties as a mayor, which it was not competent to do, the Constitutional Chamber likewise breached his political rights, in particular his rights to take part in the conduct of public affairs, as he had been elected mayor, and deprived him of his right to exercise the pertinent duties. Mr. Scarano was detained for having exercised his human rights of a political nature, as guaranteed by articles 18, 19, 22 and 25 of the Covenant. His detention therefore falls within category II of the Working Group's classification.

34. Similarly, the Working Group considers that Mr. Scarano was detained without a legal basis, on account of the exercise of his political rights, in breach of the international norms of a fair trial established in the Universal Declaration of Human Rights and the Covenant. In the instant case, the guarantees of the right of due process were also flouted. Mr. Scarano's right to be tried by a competent court (right to be tried by a natural judge) and to be able to have the sentence reviewed by a higher court was violated, because he was tried for the offence of contempt by the Constitutional Chamber of the Supreme Court of Justice and not by a competent court on the basis of a charge laid by the Public Prosecution Service. His right to the presumption of innocence was violated. This person's right to have adequate time and facilities to prepare his defence and his right to present evidence were breached. He was sentenced to imprisonment after rushed summary proceedings lasting scarcely two days. His right to present evidence proving his innocence was also violated, as was his right of review of and appeal against the judgment. For the above reasons, the Working Group considers that the detention of Mr. Scarano was arbitrary and falls into category III of the Working Group's classification.

Disposition

35. This communication concerns one of a number of detentions which the Working Group has qualified as arbitrary in its opinions: No. 51/2014 (Maikel Giovanni Rondón Romero and 316 others), No. 26/2014 (Leopoldo López), No. 29/2014 (Juan Carlos Nieto Quintero), No. 30/2014 (Daniel Omar Ceballos Morales), No. 47/2013 (Antonio José Rivero González), No. 56/2012 (César Daniel Camejo Blanco), No. 28/2012 (Raul Leonardo Linares), No. 62/2011 (Sabino Romero Izarra), No. 65/2011 (Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas), No. 27/2011 (Marcos Michel Siervo Sabarsky), No. 28/2011 (Miguel Eduardo Osío Zamora), No. 31/2010 (Santiago Giraldo Florez, Luis Carlos Cossio, Cruz Elba Giraldo Florez, Isabel Giraldo Celedón, Secundino Andrés Cadavid, Dimas Oreyanos Lizcano and Omar Alexander Rey Pérez) and No. 10/2009 (Eligio Cedeño). Many of the persons subjected to arbitrary detention are political opponents, as is the case of Mr. Scarano.

36. In view of the foregoing, the Working Group is of the opinion that Mr. Scarano's detention was arbitrary under categories I, II and III of the Working Group's classification of cases submitted for its consideration.

37. The Working Group accordingly recommends that the Government of the Bolivarian Republic of Venezuela, in the event that it has not done so, should declare the decision to detain Mr. Scarano to be null and void and that it fully redress the injury caused by his arbitrary detention.

[*Adopted on 20 April 2015*]