



General Assembly

Distr.: General
7 July 2015

Original: English

Human Rights Council Working Group on Arbitrary Detention

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

No. 6/2015 (Swaziland)

Communication addressed to the Government on 20 February 2015

concerning Thulani Rudolf Maseko

The Government has not replied to the communication.

The State is party to the International Covenant on Civil and Political Rights.¹

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 and Corr.1, 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

¹ Swaziland acceded to the Covenant on 26 March 2004.



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 aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Thulani Rudolf Maseko is a lawyer and activist who advocates for human rights, including constitutional reforms in favour of freedom and democracy in Swaziland. He is a co-founder of the organization Lawyers for Human Rights Swaziland and the Southern African Human Rights Defenders Network.

4. On 17 March 2014, Mr. Maseko was arrested by the Royal Swaziland Police at his office at Swazi Plaza in Mbabane. The warrant shown at the time of the arrest was issued by Chief Justice Michael Ramodibedi of the High Court for “contempt of court”. The charge was based on statements made in an article written by Mr. Maseko, entitled “Where the law has no place”, published in *The Nation*, an independent magazine in Swaziland. In the article, Mr. Maseko criticized the conduct of Chief Justice Ramodibedi in relation to the prosecution of a government vehicle inspector being tried for taking action against members of the judiciary allegedly involved in the misuse of government vehicles.

5. After his arrest, Mr. Maseko was detained overnight at the Mbabane police station without access to his lawyer. Reportedly, Chief Justice Ramodibedi ordered the police to deny Mr. Maseko access to his lawyer during this period.

6. On 18 March 2014, Mr. Maseko was brought to Chief Justice Ramodibedi’s chambers. The lawyers representing him had not been informed of this. However, by chance, they saw the prosecutor and followed him to the Chief Justice’s chambers. There, the Chief Justice ordered that Mr. Maseko be remanded into custody for seven days, even though the prosecutor had not requested that the defendant be remanded. After seven days, Mr. Maseko appeared before Judge Mpendulo Simelane, who extended the detention.

7. On 6 April 2014, Mr. Maseko was released when Judge Mumcy Dlamini of the High Court determined that the initial arrest warrant was invalid and contrary to the Criminal Procedure and Evidence Act. The Attorney General’s Office, along with the Office of the Director of Public Prosecutions, appealed that decision.

8. A new verbal order for Mr. Maseko’s arrest was issued in open court by Judge Simelane on 9 April 2014. Mr. Maseko was re-arrested following the decision of Judge Simelane to suspend the judgement that had led to his release on 6 April 2014.

9. On 11 April 2014, Judge Simelane denied the defendant’s application for bail pending the criminal trial even though the court had been presented with no evidence that Mr. Maseko presented a flight risk, a risk of interfering with witnesses or a risk to others.

10. In response to an application from the accused, Judge Simelane refused to recuse himself from presiding over the criminal trial, despite the fact that he had witnessed the events underlying Mr. Maseko’s allegedly contemptuous article and had taken judicial

notice of them and that he had been subpoenaed as a witness. Thus, in this matter, there appears to be a conflict of interest for Judge Simelane. Nevertheless, Mr. Maseko's trial from 14 to 30 April 2014 on the contempt of court charge was heard by Judge Simelane.

11. On 17 July 2014, Judge Simelane found Mr. Maseko guilty of the criminal offence of contempt of court. On 25 July 2014, the Judge issued a judgement sentencing Mr. Maseko to two years' imprisonment without the option of a fine or supervised release. The prison term is counted from 17 March 2014, the date he was taken into custody. Judge Simelane also imposed a fine of 50,000 Swazi emalangeni (equivalent to approximately 3,750 euros), to be paid within one month from the date of the judgement.

12. Mr. Maseko filed an appeal of his conviction and sentence. The appeal hearing was to be held in May 2015.

13. On 3 November, 2014, the Supreme Court declared that it was unable to hear the appeal against Mr. Maseko's re-arrest of 9 April 2014 because the record of the proceedings was incomplete, as it did not include a written judgement from Judge Simelane. However, no written record of the re-arrest exists because Judge Simelane issued the order verbally in open court. The Supreme Court postponed the matter indefinitely and indicated that Mr. Maseko would be entitled to submit an application to be released on bail, which would be decided by Judge Simelane.

14. On 3 December 2014, a panel of the Supreme Court overruled Judge Dlamini's decision declaring Mr. Maseko's initial arrest on 17 March 2014 unlawful. The Court held that, contrary to the prior ruling, Chief Justice Ramodibedi was authorized to issue the original warrant of arrest.

15. The source submits that the continued detention of Mr. Maseko is arbitrary and falls within categories II and III.

16. The source is of the view that Mr. Maseko was arrested and detained for exercising his right to freedom of opinion and expression, as guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. In this regard, the source argues that the penalties imposed on Mr. Maseko for his purported contempt of court cannot be justified by any measure as a proportionate response to the publication of the article for which he has been punished.

17. The source also argues that the two-year sentence was particularly harsh, as conviction for contempt of court in Swaziland ordinarily carries a 30-day sentence or a fine in the amount of 30,000 Swazi emalangeni (equivalent to approximately 2,250 euros). The judge added that the sentence should be such that "it serves as a deterrent to others".

18. The source concludes that the judgement and sentence against Mr. Maseko were intended to chill free speech and free expression, particularly with respect to speaking critically about the Government and matters of public concern, such as instances of public corruption. This intent is also evidenced by the severity of the punishment of Mr. Maseko. According to the source, the sentence only aims to sanction Mr. Maseko's human rights activities.

19. The source also submits that Mr. Maseko has not been guaranteed the international norms of due process and guarantees to a fair trial, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. The source argues that Mr. Maseko was denied the right to a public hearing by an independent and impartial court and the right to be presumed innocent in a criminal proceeding. In this regard, the source indicates that the initial arrest warrant was issued by Chief Justice Ramodibedi, on his own motion, in response to Mr. Maseko's criticism of the Chief Justice's handling of a case.

20. Chief Justice Ramodibedi remanded Mr. Maseko to pretrial custody without allowing him to consult with counsel and even though the prosecution did not request a custodial remand of the accused.

21. Judge Simelane denied Mr. Maseko's application for bail and refused to recuse himself from presiding over the criminal trial, where there was a conflict of interest.

22. The source argues that, as demonstrated by the above-mentioned facts, Mr. Maseko's prosecution for contempt of court was a results-driven process designed to ensure a conviction and a disproportionately severe sentence in order to silence criticism of the judiciary.

23. The detention of Mr. Maseko is also contrary to articles 1, 9 (3) (c) and 12 (2) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the General Assembly on 9 December 1998, and to articles II and IX of the Declaration on Principles of Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights on 23 October 2002.

Response from the Government

24. The Working Group regrets that the Government of Swaziland has not responded to the allegations transmitted by the Working Group on 20 February 2015.

25. Despite the absence of any information from the Government, the Working Group considers that it is in the position to render its opinion on the detention of Mr. Maseko in conformity with paragraph 16 of its methods of work.

Discussion

Freedom of expression

26. The Government chooses not to rebut the prima facie reliable allegations submitted by the source, according to which Mr. Maseko, a human rights advocate, was deprived of liberty for criticizing the conduct of Chief Justice Ramodibedi in relation to the prosecution of a government vehicle inspector being tried for taking action against members of the judiciary allegedly involved in the misuse of government vehicles. For this, Mr. Maseko was convicted to two years' imprisonment without the option of a fine or supervised release.

27. In this regard, the Working Group concurs with the statement of the Special Rapporteur on the right to freedom of opinion and expression that the detention and trial of Mr. Maseko for exercising his right to express his opinion on a court case "runs contrary to Swaziland's international human rights obligations, in particular under article 19 of the International Covenant on Civil and Political Rights".² Moreover, as emphasized by the Special Rapporteur, "criminal sanctions, in particular imprisonment, for alleged libel or defamation are not proportional to the effective exercise of the right to freedom of opinion and expression".³

² Office of the United Nations High Commissioner for Human Rights, "Swaziland: UN experts condemn continued detention and trial of human rights defenders", available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14687&LangID=E.

³ Ibid.

28. Furthermore, as noted by the Special Rapporteur on the independence of judges and lawyers, Mr. Maseko, as a lawyer, “has the right to take part in public discussions of matters concerning the law and the administration of justice”.⁴

29. In this regard, the Working Group also notes that, according to the Latimer House Guidelines for the Commonwealth, applicable to Swaziland as a Commonwealth country, “the criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts”⁵ and “the criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions”.⁶

30. The Working Group considers that Mr. Maseko has been deprived of liberty with a disproportionately severe sentence for having peacefully exercised his right to freedom of expression as guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Thus, the deprivation of liberty of Mr. Maseko falls within category II.

Right to a fair trial

31. Pursuant to article 14 of the Covenant, everyone has the right to a fair hearing by an impartial tribunal. The Working Group recalls that, according to the Bangalore Principles of Judicial Conduct, “a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially”.⁷ Such proceedings include instances where “the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings” or where the judge “was a material witness in the matter in controversy”.⁸

32. In the case under consideration, the warrant for the arrest of Mr. Maseko for criticizing the conduct of Chief Justice Ramodibedi was issued by the Chief Justice himself, on his own motion. Furthermore, Chief Justice Ramodibedi remanded Mr. Maseko to pretrial custody, even though the prosecution did not request a custodial remand of the accused.

33. Moreover, Judge Simelane, a material witness in the related case, remanded the accused in custody despite a previous judgement ordering the release of Mr. Maseko. Judge Simelane also denied Mr. Maseko’s application for bail and refused to recuse himself from presiding over the criminal trial where there was a conflict of interest.

34. Furthermore, in violation of article 14 of the Covenant, Mr. Maseko was deprived of his right to legal assistance and was not allowed to consult with counsel when the decision of pretrial custody was considered by Chief Justice Ramodibedi.

35. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial, established in article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant in this case is of such gravity as to give the deprivation of liberty of Mr. Maseko an arbitrary character. Thus, the deprivation of liberty of Mr. Maseko falls within category III.

⁴ Ibid.

⁵ Hatchard, John and Peter Slinn, eds., *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach: Proceedings of the Latimer House Joint Colloquium, June, 1998*, para. VI.1(b).

⁶ Ibid., para. VII (b).

⁷ Bangalore Principles of Judicial Conduct, 2002, para. 2.5.

⁸ Ibid.

Disposition

36. In the light of the preceding, the Working Group renders the following opinion:

The deprivation of liberty of Thulani Rudolf Maseko has been arbitrary, being in contravention of articles 10 and 19 of the Universal Declaration of Human Rights and articles 14 and 19 of the International Covenant on Civil and Political Rights, and falls within categories II and III of the categories applicable to the cases submitted to the Working Group for consideration.

37. Consequent upon the opinion rendered, the Working Group requests the Government to take the steps necessary to remedy the situation of Mr. Maseko and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the Covenant.

38. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Maseko and accord him an enforceable right to compensation in accordance with article 9 (5) of the Covenant.

39. The Working Group recalls the Human Rights Council's call for all States to cooperate with the Working Group, to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps that they have taken.⁹

[Adopted on 22 April 2015]

⁹ Human Rights Council resolution 24/7, paras. 3, 6 and 9.